Nos. 80-1832, 80-2170 and 80-2171

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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

SECOND SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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TABLE OF AUTHORITIES

Page

Cases:

Consumer Energy Council of America v. *FERC*, 673 F. 2d 425, appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209 ..... 3, 6

Consumer Union of the United States, Inc. v. *FTC*, No. 82-1737 (Oct. 22, 1982) 2

Dastmalchi v. *INS*, 660 F. 2d 880 4

Ghorbani v. *INS*, 686 F. 2d 784 ..... 4, 5

Shoji v. *INS*, 679 F. 2d 447 ..... 4, 5

Constitution, statutes and rule:

United States Constitution:

Article I 3

Section 7, Clauses 2 and 3 3

Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 45 *et seq.*:

Section 21(a), 15 U.S.C. (Supp. IV) 57a-1(a) 2, 3

Section 21(f)(1), 15 U.S.C. (Supp. IV) 57a-1(f)(1) 2

Page

Constitution, statutes and rule—Continued:

Section 21(f)(2), 15 U.S.C. (Supp. IV) 57a-1(f)(2) 3

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

Section 106(a), 8 U.S.C. 1105a(a) 4

Section 242(b), 8 U.S.C. 1252(b) 4, 5

Section 244, 8 U.S.C. 1254 5

Sup. Ct. R. 35.5 1

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1. Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of the

appellant-respondent Immigration and Naturalization Service, files this supplemental brief to inform the Court of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Consumers Union of the United States, Inc.* v. *FTC*, No. 82-1737 (Oct. 22, 1982). That case involved a challenge to the legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), under which a final rule promulgated by the Commission becomes effective unless both Houses of Congress, within 90 calendar days of continuous session following submission of the rule to Congress, pass a concurrent resolution disapproving the rule. *Consumers Union* concerned such a resolution disapproving a Federal Trade Commission rule regarding representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars.

In *Consumers Union*, the court of appeals, sitting en banc,[1] unanimously held[2] that Section 21(a)

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[1]The case was considered pursuant to a special statutory procedure applicable to constitutional challenges to the legislative veto provision of the Federal Trade Commission Improvements Act. Under that procedure, any interested party may file an action in the appropriate United States District Court challenging the legislative veto provision, and the constitutional questions then are certified to the court of appeals sitting en banc. 15 U.S.C. (Supp. IV) 57a-1(f)(1).

[2]Judges Wald, Mikva, and Scalia did not participate in the decision.

and the concurrent resolution of disapproval passed by the Senate and House of Representatives pursuant to that Section are unconstitutional because they "violate the principles of separation of powers established in Articles I, II and III of the Constitution" and because they "violate the procedures established by Article I for the exercise of legislative powers" (slip op. 6).[3] In so holding, the en banc court of appeals adopted the reasoning of the panel of that court in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209, which, the court observed, had "thoroughly considered and disposed of" these constitutional issues (slip op. 6).[4] For the convenience of the

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[3]Because Section 21(a) of the Federal Trade Commission Improvements Act provides that a resolution of disapproval must be passed by both Houses of Congress, one of the two constitutional requirements for the exercise of legislative power — bicameral approval of the measure — was satisfied in the *Consumers Union* case. The court's holding that Section 21(a) and the resolution of disapproval "violate the procedures established by Article I for the exercise of legislative powers" therefore necessarily referred to the requirement in Article I, Section 7, Clauses 2 and 3 that any bill or resolution intended to have binding effect outside of the Legislative Branch be presented to the President for his approval or veto after it has been passed by the Senate and House of Representatives.

[4]Section 21(f)(2), 15 U.S.C. (Supp. IV) 57a-1(f)(2), provides that any decision on a matter certified to the court of appeals "shall be reviewable by appeal directly to the

Court, we have lodged ten copies of the decision in *Consumers Union* with the Clerk of this Court.

2. We also take this opportunity to inform the Court of two decisions of other courts of appeals that concern the jurisdiction of a court of appeals under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (& Supp. V) 1105a(a), on a petition for review of an order of deportation. *Ghorbani* v. *INS*, 686 F.2d 784 (9th Cir. 1982); *Shoja* v. *INS*, 679 F.2d 447 (5th Cir. 1982). Those cases involved challenges by Iranian aliens who were admitted on student visas, but who were subsequently ordered deported because they were out of status, to the failure of the District Director to take various discretionary actions that would have had the effect of restoring the aliens to student status. The Ninth and Fifth Circuits held that they did not have jurisdiction to review the District Director's actions because those actions occurred in proceedings that were separate and distinct from the deportation proceedings conducted by the Immigration Judge under Section 242(b) of the Act, 8 U.S.C. 1252(b).

The holdings in these cases are correct and are consistent with the holding of the Third Circuit in *Dastmalchi* v. *INS*, 660 F.2d 880 (1981), discussed

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Supreme Court of the United States" brought "not later than 20 days after the decision of the court of appeals." The Senate and House of Representatives filed notices of appeal to this Court on November 4, 1982, within 20 days of the court of appeals' decision of October 22, 1982.

in our principal brief in this case (at 71-72 & n.44). As we also explain in our principal brief (at 71-72 & n.44), these holdings regarding jurisdiction to review the actions of the District Directors (including the constitutionality of the regulations pursuant to which they ordered Iranian students to report for review of their status) are fully consistent with the Ninth Circuit's jurisdictional holding in the instant case. Respondent-appellee Chadha did not challenge any actions of a District Director taken outside the context of deportation proceedings under Section 242(b) of the Act, as in *Ghorbani* and *Shoja*. He instead challenged the validity of the final order of deportation that was entered against him in the deportation proceedings under Section 242(b) of the Act, on the ground that the legislative veto provision in Section 244 of the Act, 8 U.S.C. 1254, that required the Immigration Judge to enter the deportation order is unconstitutional. Thus, as the Ninth Circuit observed in *Ghorbani* (686 F.2d at 790; footnote omitted), in distinguishing *Ghorbani* from this case, "[i]n *Chadha*, the constitutionality of section 244, the very statute under which relief was granted by the immigration judge, was an integral part of the section 242(b) proceedings."[5]

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[5]The Fifth Circuit also recognized that the jurisdictional issue in *Shoja* was distinct from that in the instant case, and it expressed no view on the correctness of the jurisdictional holding of the Ninth Circuit in this case. 679 F.2d at 451 n.3.

For the foregoing reasons and the additional reasons set forth in our principal brief and in our supplemental brief filed in February 1982 calling the Court's attention to the decision in *Consumer Energy Council of America* v. *FERC, supra,* it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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MOTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT AND SUPPLEMENTAL BRIEF ON REARGUMENT

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CONTENTS

	Page
Table of Authorities	I
Supplemental Brief on Reargument	1
Summary of Argument	2
Argument	4
Conclusion	45

TABLE OF AUTHORITIES

Cases:

Accardi v. *Shaughnessy*, 347 U.S. 260 (1964)	24
Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 (1937)	42
Aikens v. *Kinsbury*, 247 U.S. 484 (1918)	30
American Foreign Service Ass'n v. *McPherson*, (D.D.C. Civil Action No. 81-2073)	43
Atkins v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977)	6
Baker v. *Carr*, 369 U.S. 186 (1962)	18, 19, 36
Barrows v. *Jackson*, 346 U.S. 249 (1953)	32
Berman v. *United States*, 302 U.S. 211 (1937)	23
Blum v. *Yaretsky*, 102 S.Ct. 2777 (1982)	31
Buckley v. *Valeo*, 424 U.S. 1 (1976)	6, 40
Carlson v. *Landon*, 342 U.S. 524 (1952)	12
Chadha v. *INS*, 634 F.2d 4 (9th Cir. 1980)	*passim*
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968)	24
Chicago & Grand Trunk R. Co. v. *Wellman*, 143 U.S. 339 (1892)	37
Chicago & Southern Air Lines v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948)	19, 26, 27
Chrysler v. *Brown*, 441 U.S. 281 (1979)	28
Clark v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (en banc)	41
Consumer Energy Council of America v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982)	*passim*

Cases—Continued

Consumers Union of United States v. *Federal Trade Commission*, D.C. Cir. No. 82-1737 (issued Oct. 22, 1982) ..... *passim*

Columbus & Greenville Ry. v. *Miller*, 283 U.S. 96 (1931) 41

Crowell v. *Benson*, 285 U.S. 22 (1932) 13

Diamond v. *Chakrabarty*, 447 U.S. 303 (1980) 22

Decatur v. *Paulding*, 14 Pet. 497 (1840) 20

Duke Power Co. v. *Carolina Env. Study Group*, 438 U.S. 59 (1978) 29, 34, 35

Ex parte Bakelite Corp., 285 U.S. 438 (1929) 12, 25

Data Processing Service v. *Camp*, 397 U.S. 150 (1969) .. 32

Escoe v. *Zerbst*, 295 U.S. 490 (1935) 23

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 7

Fiallo v. *Bell*, 430 U.S. 787 (1977) 11, 15, 19

Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) .. *passim*

Frothingham v. *Mellon*, 262 U.S. 447 (1923) 30

Galvan v. *Press*, 347 U.S. 522 (1954) 12

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 29, 30, 33

Heald v. *District of Columbia*, 259 U.S. 114 (1922) 31

Heikkila v. *Barber*, 345 U.S. 229 (1953) 18

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 19

Hatch v. *Reardon*, 204 U.S. 152 (1907) 31

Jay v. *Boyd*, 351 U.S. 345 (1956) ..... *passim*

Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 11

Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 12

Landon v. *Plasencia*, 51 U.S.L.W. 4001 (Nov. 15, 1982) 18

Liverpool Steamship Co. v. *Emigration Commissioners*, 113 U.S. 33 (1885) 41

Mahler v. *Eby*, 264 U.S. 32 (1924) 19

Marbury v. *Madison*, 1 Cranch 137 (1803) 30

Matthews v. *Diaz*, 426 U.S. 67 (1967) 14, 18

Marshall v. *Dye*, 231 U.S. 250 (1913) 41

McCray v. *United States*, 195 U.S. 27 (1904) 20

McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 11, 13, 14, 15, 25

Cases—Continued

	Page
Moore v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 47 (1971)	38
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855)	25
Northwest Airlines Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981)	21
Nishimura Ekui v. *United States*, 142 U.S. 651 (1892)	12
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977)	15
Nixon v. *Fitzgerald*, 102 S.Ct. 2690 (1982)	8, 29
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982)	13, 24
Oceanic Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909)	11
Pacific Legal Foundation v. *Watt*, 529 F.Supp. 982 (D. Mont. 1981); 539 F.Supp. 1194 (D. Mont. 1981)	43
Plymouth Coal Co. v. *Pennsylvania*, 232 U.S. 531 (1914)	31
Pope v. *United States*, 323 U.S. 1 (1944)	40
Red River Valley Bank v. *Craig*, 181 U.S. 548 (1901)	31
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953)	12, 18
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)	30, 33
Smiley v. *Kansas*, 196 U.S. 447 (1905)	31
Smith v. *Indiana*, 191 U.S. 138 (1903)	40
Southern Railway Co. v. *King*, 217 U.S. 524 (1910)	31
Supervisors v. *Stanley*, 105 U.S. 305 (1881)	32
The Chinese Exclusion Case, 130 U.S. 581 (1889)	12, 32
Texas Industries Inc. v. *Radcliff Materials Inc.*, 451 U.S. 630 (1981)	22
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936)	11
United States v. *Ju Toy*, 198 U.S. 253 (1905)	13
United States v. *Richardson*, 418 U.S. 166 (1974)	40
United States v. *Topco Associates*, 405 U.S. 596 (1972)	22
Valley Forge Christian College v. *Americans United for Separation of Church and State*, 102 S.Ct. 752 (1982)	29, 32
Wayman v. *Southard*, 10 Wheat. 1 (1825)	26

Cases—Continued
Williams v. *Pierce*, (S.D.N.Y. Civil Action No. 82 Civ. 5224) ..... Page 44
Constitution:
Article I, Section 7 2
Article I, Section 8, cl. 4 13
Article I, Section 8, cl. 17 ..... *passim*
Article II, Section 3 ..... 28, 45
Statutes:
8 U.S.C. § 1251(a)(2) ..... *passim*
8 U.S.C. § 1254(c)(2) ..... *passim*
8 U.S.C. § 1254(d) ..... *passim*
Miscellaneous:
H.R. Res. 926, 94th Cong. 1st Sess. (1975) ..... *passim*
2 C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, § 7.9a (1977) 23
Barber, *The Constitution and the Delegation of Congressional Power*, 111 (1975) 6
13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3530 (1975) 42
III *Elliot's Rebates* 464 15

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MOTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT

The United States House of Representatives respectfully asks leave of Court to file the attached Supplemental Brief on Reargument.

These consolidated cases were argued on February 22, 1982. On July 2, 1982, the Court ordered that the cases be "restored to the calendar for reargument." 50 U.S.L.W.

3998.27 (U.S. July 2, 1982). The reargument is scheduled for December 7, 1982.

The attached Supplemental Brief is not limited to "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in [the] brief in chief," within the meaning of Rule 35.5. It is therefore necessary to seek leave to file this brief.

The House of Representatives seeks leave to file this attached supplemental brief because these cases involve profound and difficult issues respecting jurisdiction, justiciability, and the constitutional structure of the three branches of the federal government. The fact that the Court deemed it necessary to order reargument seems to indicate that these important problems find no easy answers. The House of Representative believes that the further considerations and arguments contained in the attached brief may be of assistance to the Court in resolving these many-faceted cases.

Some of the additional considerations advanced by the House in the attached brief are derived from the Court's discussion last Term of congressionally created "public rights." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982). Attention is also paid to some of the judicial progeny of the Ninth Circuit's ruling in *Chadha*. Particular references are made to the District of Columbia Circuit's post-*Chadha* rulings in *Consumer Energy Council, et al.* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), now pending before this Court on appeals and petitions for certiorari (Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209); and in *Consumers Union of United States, et al.* v. *Federal Trade Commission, et al.* (D.C. Cir. No. 82-1737, Oct. 22, 1982), appeals from which are destined to be filed in this Court.*

Other Article III repercussions of the *Chadha* ruling are found in several District Court decisions and proceedings, discussed in the attached brief. *Pacific Legal Foundation* v. *Watt*, 529 F.Supp. 982 (D.Mont. 1982); *American Foreign Service Association* v. *McPherson* (S.D.N.Y. Civil Action No. 82 Civ. 5224).

Wherefore, the House requests leave of Court to file the attached Supplemental Brief on Rehearing.

Respectfully submitted,

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UNITED STATES HOUSE OF REPRESENTATIVES SUPPLEMENTAL BRIEF ON REARGUMENT

The United States House of Representatives submits this Supplemental Brief to emphasize certain additional considerations that merit the Court's attention in these consolidated cases. Some of the considerations advanced

11-640 O - 82 - 2

last Term by the parties also deserve reevaluation in light of the new insights and reflections contained herein.

SUMMARY OF ARGUMENT

At the heart of this case is the essentially negative nature of the House resolution in question, H. Res. 926. It states that "the House of Representatives does *not* approve the granting of permanent residence in the United States" to Jagdish Rai Chadha, an alien who concedes his deportability (emphasis added).

The Ninth Circuit, like the parties below, seems intent on extracting some kind of positive lawmaking out of the negative character of H. Res. 926. The attempt is flawed by confusion and uncertainty. No effective demonstration is made that H. Res. 926 has altered or affected any legal right or interest of Chadha. Nor is it shown that H. Res. 926 operated to change Chadha's legal *status quo,* which at all times has been that of a lawfully deportable alien. Thus the parties and the court below are unable to show that the passage of H. Res. 926 is equivalent to the passage of plenary legislation, which must meet the bicameral and presentment requirements of Article I, Section 7.

On the false premise that there must be some positive lawmaking aspects to H. Res. 926, the Ninth Circuit reaches an absurd constitutional conclusion: Congress is said to lack constitutional power to provide a statutory scheme for saying "no" to requests from individual deportable aliens that they be allowed to remain permanently in the United States. It is said to lack that power because the statutory scheme embodied in Section 244(c)(2) constitutes an unconstitutional interference by Congress with the executive and judicial functions under Section 244. That cannot be.

Such an exercise in constitutional adjudication totally overlooks the kind of vested power that Congress is here exercising. It is the power of Congress to deal with the exclusion of illegal aliens. Over no conceivable subject is the legislative power of Congress more complete than it is over that subject. It is a vast power, grounded in the sov-

ereignty of the United States and partaking of domestic and foreign political affairs. This Court has long recognized that the scope of judicial intervention in such matters is extremely limited. Indeed, congressional decisions on these issues historically have been treated by the Court as "political questions" immune from judicial consideration or response. The congressional decision reached in H. Res. 926 must be considered to be of that nature.

Such sovereign and political considerations make the judgment of the Ninth Circuit in this case especially suspect. Under the guise of granting relief for a perceived constitutional violation by Congress, the court of appeals orders that Chadha's deportation proceedings be cancelled, that his status be adjusted to that of a permanent resident alien, that the Attorney General cease and desist from taking any steps to deport Chadha (which he is obliged to do under Section 244), and that the status alteration be retroactive to 1974, making Chadha immediately eligible to apply for naturalization. This is judicial intrusion into legislative policymaking.

The opinion below also succeeds in misreading the language and import of Section 244 of the Immigration Act. It ignores the obvious fact that the Section 244 scheme relates to processing applications for congressional "acts of grace" or waivers of lawful deportation orders. It also ignores the fact that Section 244 deals with congressionally created "public rights." That means that Congress, in dealing with the "public rights" or entitlements associated with applications by aliens for "acts of grace," can statutorily provide for deciding such matters itself, or delegate authority to decide to executive officers or judicial tribunals. All of which emphasizes how great is the Ninth Circuit's misconception of the authority of Congress to condition its delegation to others.

All these considerations need not be resolved by the Court at this time. It still remains true, as was urged at the argument last Term, that Chadha does not have Arti-

cle III standing to institute this litigation. Nor can such litigation be allowed in federal courts in the absence of truly adverse party litigants. The *Chadha* precedent allowing such suits has already produced a number of unfortunate progeny.

ARGUMENT

1. THE DECISION BELOW REFLECTS A CRITICAL MISUNDERSTANDING OF THE NON-LAWMAKING CHARACTERISTICS OF H. RES. 926

The controlling factor in this case, the factor that dominates all issues, is essentially negative in nature. It involves what Congress did *not* do, rather than what it did do.

The essentially negative nature of the resolution is borne out by the very terms of H. Res. 926, which states that "the House of Representatives does *not* approve the granting of permanent residence in the United States" to the alien Jagdish Rai Chadha. J.S. App. 69a, emphasis added. Consider the legal and practical implications of the use of the word "not" in H. Res. 926:

(1) One House of Congress did *not* approve the granting of permanent residence in the United States to Chadha. That means that Chadha did not acquire the new status of a permanent resident alien.

(2) Because of H. Res. 926, Congress did *not* undertake an "act of grace," *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Only by such a discretionary "act of grace," concurred in by both Houses, could Chadha's deportation proceedings be cancelled and his status changed to that of a permanent resident alien. 8 U.S.C. § 1254(d).

(3) Thus Congress did *not* so act as to alter the legal *status quo* respecting the alien Chadha. This *status quo* at all times has been, and remains, that of a concededly deportable alien. And he is deportable not as a result of the adoption of H. Res. 926, but as a result of having overstayed his student visa in violation of Sections 101(a)(15)(J) and 1251(a)(2) of the Act.

(4) It further follows that, by virtue of H. Res. 926, Congress did *not* enact any kind of what the Ninth Circuit calls "positive law that alters individuals' substantive rights," 634 F2d at 434. Congress has done nothing to affect the positive legal rights or interests of Chadha. He asserts no legal or constitutional rights respecting his deportation order. And any entitlement he may have to a Section 244 "act of grace" from Congress, even if he is eligible on "hardship" grounds, "is manifestly not a matter of right under any circumstances." *Jay* v. *Boyd*, 351 U.S. at 354. Thus the House disapproval of Chadha's plea for an adjustment of his deportable status cannot operate to alter any of his personal rights or to effect a change in his legal *status quo*. Chadha remains a deportable alien. H. Res. 926 accordingly does not qualify as a "positive law" enactment.

The Ninth Circuit, like the parties below, exhibits uncertainty and confusion about the positive lawmaking features of H. Res. 926. The court does say, quite properly, that positive law is that "which alters the substantive legal rights of individuals," 634 F.2d at 435. The court then makes a controversial assumption that the power of Congress under the Necessary and Proper Clause to "make all laws" does not include the power to "alter substantive legal rights of individuals" by doing something less than enacting a plenary statute. That "something less" in this instance is said to be the alteration of individual rights by a "legislative inaction" approval of "a mere executive recommendation"—all done pursuant to the procedures specified in Section 244(c)(2).

There are numerous flaws in that assumption. This case does not involve any of Chadha's "substantive legal rights." And any possible "legislative inaction" approval of the Attorney General's recommendation that Congress give Chadha a discretionary "act of grace" is not an exercise of congressional power under the Necessary and Proper Clause to "make all laws." It is a statutorily au-

thorized involvement by Congress in its uniquely sovereign and political power respecting alien deportation.

But the chief difficulty with the Ninth Circuit's assumption is that, on its own terms, the assumption does not apply to H. Res. 926. That resolution *disapproved* any possible change in Chadha's deportable status. H. Res. 926 has no positive lawmaking characteristics, even under the Ninth Circuit's definition. The court failed to distinguish between negative and affirmative legislative action under Section 244(c)(2). It therefore addressed what it thought was "an insurmountable formal constitutional problem" stemming from "legislative inaction" *approval* of a change in Chadha's legal *status quo.*

The negative legislative judgment rendered by H. Res. 926 presents no insurmountable constitutional problems. In the words of Justice White's separate opinion in *Buckley* v. *Valeo,* 424 U.S. 1, 285 (1976), the power of either House, to disapprove is not the "equivalent to legislation or to an order . . . requiring the concurrence of both Houses. The one-House disapproval device, to repeat, "does not alter the existing law in any fashion, but only preserves the legal *status quo.*" *Atkins* v. *United States,* 556 F.2d 1028, 1963 (Ct. Cls. 1977),[1] *cert. denied* 434 U.S. 1009 (1978).

This curious inability to distinguish between two-House lawmaking and one-House non-lawmaking manifests itself in several other passages in the Ninth Circuit's opinion. Thus there is an ominous reference to "the potential for unfair or discriminatory use of lawmaking [by the disapproval mechanism] directed at named individuals." 634 F.2d at 535. Coupled with the drastic nature of the deportation sanction, says the court, "disapprval as an exercise of legislative power . . . would raise serious

[1] "Therefore, we can say that when a decision not to change the status quo is involved, either house can speak for Congress." Barber, *The Constitution and the Delegation of Congressional Power* 111 (1975). That is equally true when one House votes down, or refuses to consider, a bill introduced by one of its own members.

bill of attainder and equal protection problems." *Id.*, n. 42.

Suffice it to say that these "problems" are both illusory and non-existent in the context of a one-House disapproval that serves to perserve the legal *status quo* of a named individual. Chadha, it bears repeating, is not singled out in H. Res. 926 in order to impose on him the deportation sanction. He is not singled out for any kind of discriminatory treatment, and he does not so claim. Chadha concedes he is deportable under the Act, and H. Res. 926 leaves him precisely in that status. He is singled out in the resolution simply because at least one House of Congress deems it inappropriate to grant him, as an illegal alien, "permanent residence in the United States." Congress, as the House has long maintained, has unquestioned power to deny individual aliens such permanent residence. That proposition the Ninth Circuit does not even mention.

The Ninth Circuit also seeks to convert its inability to distinguish between the lawmaking and the non-lawmaking aspects of Section 244 into "a regime under which any presidential proposal on a given subject would become part of the United States Code if no house of Congress objected within, say, sixty days." 634 F.2d at 435. But the instant case does not involve any kind of two-House non-objection being used to permit an executive proposal or act to become part of "the law." Quite the contrary. There has been no law change in and no addition to the United States Code. And to suggest that one instance of non-lawmaking under Section 244 indicates that Congress has embarked on a process of subverting the whole bicameral legislative process is to make applicable this Court's remark in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940):

> It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes

> timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May,* 194 U.S. 267, 270.

The Congress' power is not controlled by what it "might do," but what it *has* done and the Ninth Circuit's hypothetical posturing can no more serve as a basis for voiding exercise of power over aliens than the positing of hypotheticals about the reckless conduct by President's could serve to limit his powers. *Nixon* v. *Fitzgerald,* 102 S.Ct. 2690 (1982).

Seemingly in an effort to avoid some of the Ninth Circuit's confusion respecting the non-lawmaking nature of H. Res. 926, the Solicitor General's brief in this Court, filed on behalf of the INS, falls into even greater confusion and difficulty. The whole brief is premised on the thought that Section 244(c)(2) is unconstitutional because it authorizes a negative one-House resolution to serve as a kind of "positive law." The very first sentence of the argument portion of the brief (p. 15), makes the astounding assertion that Section 244(c)(2) "authorizes one House of Congress, acting alone, to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws." Section 244(c)(2) says no such thing. When one House disapproves a Section 244 petition for an "act of grace," the Attorney General is required to deport the petitioning alien because the alien's plea for mercy has failed and because he is otherwise deportable under the immigration laws. Certainly that is the way the Attorney General has interpreted and performed his duties under Section 244, at least prior to the *Chadha* litigation.

From the faulty premise that a one-House resolution of disapproval under Section 244(c)(2) "requires" the Attorney General to deport an individual "who otherwise would not be deported," the Solicitor General's brief then attempts a description of this kind of "positive lawmaking." Actually, the Solicitor General presents two ver-

sions, which may be most conveniently compared side by side.

The "Summary of Argument" version, p. 10	The "Argument" version, p. 15
The effect of a resolution passed by one House pursuant to that Section therefore is precisely the same as that of a duly enacted *law* amending the Act to exclude a particular alien from eligibility for relief.	The effect of a resolution passed by one House under that Section is to amend the Act to exclude a particular alien from the relief generally afforded to aliens who are found by the Attorney General, after a hearing, to be eligible for suspension of deportation and permanent resident alien status.

But the Solicitor General offers no clues as to which version of "the law" enacted by H. Res. 926 is the correct one. Does the claimed amendment of the Act relate to excluding Chadha "from eligibility for relief," or does it exclude Chadha "from the relief generally afforded to aliens" found eligible by the Attorney General? The truth is that either version is spurious. Both the temporary "suspension" relief available from the Attorney General and the final "act of grace" relief available from the Congress are given or withheld in large part as discretionary matters. And the fact that Chadha was considered eligible for the temporary relief afforded by the Attorney General has no bearing on whether Congress, in its legislative discretion, desires to confer permanent residence status on an illegal alien.

The attempt to convert a legislative "no" into a legislative "yes" is marked by a not-so-subtle shift in defining the focus of the legislative resolution of disapproval. The shift is from the substantive law of the subject matter of the resolution to the procedures and actions of the officer or agency below. Thus in the instant case, the search for a positive law change focuses not on Chadha's status as a deportable alien or his entitlement to become a perma-

11-640 O - 82 - 3

nent resident but on the supposed change in Chadha's eligibility for the relief "generally afforded" aliens found eligible by the Attorney General. In other words, the positive law change is said to be found in the inability of the Attorney General to give Chadha the kind of relief he generally affords other eligible aliens. That argument is without merit. The inability of the Attorney General to give Chadha relief, or his loss of eligibility, stems from the Section 244 scheme.

The *Chadha* court's faulty efforts to transmute a negative into a legislative "yes" has already been seized upon by the D.C. Circuit in *Consumer Energy Council, et al.* v. *Federal Energy Regulatory Commission,* 673 F.2d 425 (D.C. Cir. 1982), now pending before this Court on appeals and petitions for certiorari (Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209). In that case, the House of Representatives voiced its disapproval, by a resolution, of a proposed Commission regulation respecting natural gas pricing. In holding that such one-House disapproval constituted an attempt to legislate a positive law change in violation of the Presentment Clauses, the court held that the disapproval resolution "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect." 673 F.2d at 465. That is a perfect illustration of the *Chadha*-like search for a positive law change. The focus of the search is the effect on the agency's discretion—which in any event is the product of the statutory scheme—and not the substantive legal effects on the rights or obligations of affected persons.

2. THE DECISION BELOW UNDERMINES THE CONSTITUTIONAL AND SOVEREIGN POWER OF CONGRESS OVER ALIENS, INCLUDING THE POWER TO DENY PERMANENT RESIDENT STATUS TO DEPORTABLE ALIENS

The Ninth Circuit reaches an absurd constitutional result. It literally holds that Congress lacks constitutional power to provide a statutory scheme for saying "no" to requests from individual deportable aliens that they be

allowed to remain permanently in the United States. That power to say "no" must either be lodged in the Executive and the Judiciary or be translated into new plenary legislation, in the nature of private bills.

That result is constitutionally unwarranted. Not one word or provision in the Constitution dictates or even suggests such a limitation on the power of Congress respecting the ever-present problems of immigration and deportation. On the contrary, as *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819) made clear, ours is a Constitution designed "to be adapted to the various *crises* of human affairs," a Constitution that expands rather than contracts "the power of Congress to adopt any [statutory means] which might be appropriate, and which were conducive to the end" of executing "those great powers on which the welfare of a nation essentially depends." And it is in that spirit that Section 244(c)(2) is to be juxtaposed with one of the greatest powers of Congress, the vested power over aliens.

A. THE SOVEREIGN FACTOR

It bears repetition that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission and exclusion of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909); *accord*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). This congressional power is uniquely plenary, truly extraordinary. It not only partakes of the vested Article I powers over naturalization and foreign commerce but exists "as inherently inseparable from the conception of nationality . . . in the laws of nations." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936).

As stated in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893), the power to exclude or expel aliens is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." The power has also been described as "an incident of sovereignty belonging to the govern-

ment of the United States, as a part of those sovereign powers delegated by the Constitution." *The Chinese Exclusion Case,* 130 U.S. 581, 609 (1889).[2] And this great sovereign power is constitutionally vested in the Congress of the United States. Indeed, that the formulation of policies and procedures for exercising such sovereign power is entrusted exclusively to the Congress is "about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press,* 347 U.S. 522, 531 (1954).

Moreover, this sovereign power over aliens necessarily includes the power to admit or exclude either classes of aliens or individual aliens. *See Knauff* v. *Shaughnessy,* 338 U.S. 537, 543 (1950), acknowledging the power "to exclude a given alien" as being a fundamental act of sovereignty. This power to exclude particular aliens in turn includes power "to determine what noncitizens shall be permitted to remain within our borders." *Carlson* v. *Landon,* 342 U.S. 524, 534 (1952). Thus when a deportable alien applies for permission to remain within our borders as a permanent alien resident, he is asking Congress to exercise one of its most sovereign functions.

The procedure by which Congress responds to such a request is determinable solely by Congress. Whatever entitlement or right the alien may be said to have with respect to securing the requested status change, it is a congressionally created "public right" that is not inherently judicial in nature. And when such public rights are involved, the constitutional rule announced in *Ex parte Bakelite Corp.,* 285 U.S. 438, 451 (1929),[3] becomes applicable:

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[2] See also *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 659 (1892), describing the legislative power over aliens as one "inherent in sovereignty." In *Carlson* v. *Landon,* 342 U.S. 524, 534 (1952), the Court observed that the plenary power of Congress to expel aliens stems from "the sovereign right to determine what noncitizens shall be permitted to remain within our borders." And see *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953).

[3] *Ex parte Bakelite Corp.,* 279 U.S. at 451, n. 8, cites the landmark decision in *Fong Yue Ting,* 149 U.S. at 714–715, sustaining the power

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> The mode of determining matters of this class is completely within congressional control. *Congress may reserve to itself the power to decide,* may delegate that power to executive officers, or may commit it to judicial tribunals. (Emphasis added).

See also *Crowell* v. *Benson,* 285 U.S. 22, 50-51 (1932); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 102 S.Ct. 2858, 2869-2871 (1982).

The inescapable conclusion is that the plenary sovereign authority of Congress over aliens provides powerful constitutional support for the congressional procedures embodied in Section 244(c)(2). Congress has there provided for its own involvement in the sovereign decision whether a particular deportable alien should be granted the privilege of staying permanently within the United States. At this late stage of constitutional development, "it would be an extraordinary departure from the usual course of the human mind, *McCulloch* v. *Maryland,* 4 Wheat. at 419, to deny the sovereign footings of the Section 244(c)(2) procedures.

The Ninth Circuit simply avoids any mention of the sovereign nature of the congressional power over aliens. It recognizes the existence of such power, but only to the extent that it reflects congressional power over foreign commerce and naturalization under Art. I, § 8, cl. 4. *See* 634 F.2d at 433. But the court misses the significance of even these two constitutional footings of Section 244(c)(2). Having quoted the foreign commerce and naturalization provisions of Article I, Section 8, the Ninth Circuit proceeds to ignore them as tools in the process of constitutional adjudication. The power of Congress over aliens, to

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of Congress to expel aliens, as an instance of the kind of powers which can be executed by Congress itself. Likewise, *Crowell* v. *Benson,* 285 U.S. at 51, n. 13, cites in support of this same proposition such immigration cases as *United States* v. *Ju Toy,* 198 U.S. 253, 263 (1905). More recently, the plurality opinion in the *Northern Pipeline* case, 102 S.Ct. at 2870, n. 22, quotes anew the *Crowell* v. *Benson* catalogue of "public rights"—including immigration matters—that Congress can either resolve itself, delegate to executive officers, or commit to courts.

the extent the court acknowledges its existence, is said not to justify the use of the one-House disapproval device "to revise particular administrative dispositions" or to enact "positive law that alters individuals' substantive rights." 643 F.2d at 434.

But the court's concentration on perceived misuses of the plenary power of Congress over aliens violates the court's own dictum that "the legitimacy of a particular exercise of this power cannot be decided in the abstract." 643 F.2d at 434. Indeed it cannot. The exercise of a congressional power must first be considered in light of the power itself. *McCulloch* v. *Maryland* made it crystal clear that the means employed by Congress to execute a vested power cannot be assessed in isolation; the means must be rationally related to some constitutional end. In *McCulloch*'s words, the means must relate to "the accomplishment of objects . . . entrusted to the government" and must be "really calculated to effect any of the objects entrusted to the government." 4 Wheat. at 423.

Thus, if Section 244(c)(2) is "really calculated" to effect this sovereign power over aliens, involving as it does matters that "may implicate our relations with foreign powers," *Matthews* v. *Diaz,* 426 U.S. 67, 81 (1967), then we have a different and highly significant factor to consider in assessing the constitutionality of Section 244(c)(2). Only if some other provision of the Constitution—be it the Presentment Clauses or the general separation of powers doctrine—can be said "imperiously," *McCulloch,* 4 Wheat. at 408, to withhold from Congress the power to implement this sovereign power by use of the one-House disapproval device, can any part of Section 344(c)(2) be rendered unconstitutional.

Such factoring in of the sovereign nature of this power, when figuring the ultimate constitutional equation, is why this Court has consistently said that, when exercising this kind of sovereign power over aliens, "Congress regularly makes rules that would be [constitutionally] unacceptable if applied to citizens." *Matthews* v. *Diaz,* 426

U.S. at 80, *quoted with approval* in *Fiallo* v. *Bell*, 430 U.S. at 792. And that is why this Court has consistently tested various alien-control statutes by balancing the sovereign power over aliens against other constitutional provisions that aliens have relied upon, such as the Fifth Amendment. *See Fong Yue Ting*, 149 U.S. at 712-713. It thus may be decisive that, given the sovereign objectives involved, the one-House disapproval device may be constitutionally justified "by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

The Ninth Circuit asks and answers the wrong constitutional questions. The constitutional problem is not whether the legislative review device, viewed generically and in isolation, is consistent with the Presentment Clauses or the general separation of powers doctrine. The problem, rather, is whether the one-House disapproval device, when used in aid of executing the exclusive and sovereign legislative power to determine which deportable aliens should be given permanent residence in the United States, is "imperiously" proscribed by the Presentment Clauses or the general separation theory. The Ninth Circuit's opinion provides no answers to that critical question.

Unfortunately, the opinion below, by disregarding the sovereign factor in this case, may well have deprived Congress "of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances," *McCulloch*, 4 Wheat. at 415, in dealing with the volatile problems of illegal and deportable aliens.

More than that, the court in effect reduces the Necessary and Proper Clause to what Governor Randolph called "tautology." III Elliot's Debates 464. It deprecates and dilutes the ability to exercise a sovereign power deemed essential to the safety and welfare of the country, *Fong Yue Ting*, 149 U.S. at 711, save through the enactment of new plenary legislation. And by effectively trans-

ferring the exercise of this sovereign legislative power to the Executive and the Judiciary, the court creates an unfortunate legacy. By terms of the opinion below, Congress has lost control not only of the exercise of its own uniquely sovereign power but also of its capacity to achieve the inter-Branch coordination so essential to the working of modern complex government.

B. THE POLITICAL QUESTION FACTOR

After a glancing acknowledgement that the Naturalization Clause, in conjunction with the Necessary and Proper Clause, "gives Congress considerable power over aliens," 634 F.2d at 418, the Ninth Circuit gives short shrift to the political question factor in this case. The court concludes that the political question doctrine is not implicated because Chadha's claim rests on the separation of powers doctrine, which is not textually committed to any one branch. The court adds that it "would stand the political question doctrine on its head" if the Judiciary were required to defer to another branch's determination that its acts do not violate the separation doctrine. 643 F.2d at 419.

That analysis is unacceptable and counterproductive. It turns upside down a political question strawman. No one argues that the political question in this case is to be found in the separation doctrine. Where it is found is in the political determination in H. Res. 926 that the House of Representatives disapproves granting Chadha "permanent residence in the United States." And that constitutional basis for Congress or either House making that kind of a political determination is to be found in the vast sovereign power of Congress over aliens, in conjunction with the Naturalization Clause and the Necessary and Proper Clause. The separation doctrine is relevant, if at all, only to the extent that it can be said to restrict or prohibit congressional authority to make such a political determination.

Perhaps the most ironic and troublesome aspect of the decision below is the Ninth Circuit's own determination

that Chadha should be allowed permanent residence in the United States. Under the guise of providing relief for the perceived violation of the separation doctrine, the court (1) decrees finality to the Attorney General's decision to "stay" deportation (634 F.2d at 436), (2) deems Chadha's lawful deportation proceedings cancelled (at 436), (3) orders the Attorney General to "cease and desist from taking any steps to deport this alien" based upon H. Res. 926 (at 436), (4) refuses to "relegate him to the relief afforded by the immediate relative petition" (at 417, n. 6), and (5) awards Chadha permanent resident status, effective retroactively to 1974, so that he becomes immediately eligible to apply for naturalization (at 417, n. 6). There is no statutory or legal authorization cited in support of such judicial determinations of political questions. As developed below, such judicial orders that effectively and unabashedly grant permanent resident status to Chadha are of the essence of a political question determination. The Ninth Circuit itself has violated the separation of powers doctrine, for the determination of political questions is simply beyond the Article III competence of the Judiciary.

That the grant of permanent resident status to a lawfully deportable alien is a determination of a political question is a proposition long established by this Court's precedents. The highly sovereign component of the congressional power over individual aliens has always been recognized as giving a strong political coloration to the exercise of that power. Thus in *Fong Yue Ting*, 149 U.S. at 712–713, the Court spoke of such exercises as involving "political questions," the answering of which is vested by the Constitution in "the political departments of the government." For that reason, the Court added (at 712–713),

> . . . it behooves the court to be careful that it does not undertake to pass upon [such] political questions . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

11-640 O - 82 - 4

As if to make the point doubly clear, the Court repeated (at 731) that the question "whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Faithful to the *Fong Yue Ting* precedent, the Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210 (1953). *See Heikkila* v. *Barber,* 345 U.S. 229, 233 (1953), referring to "the purely political nature of the legislative power over aliens"; *Landon* v. *Plasencia,* 51 U.S.L.W. 4001, 4005 (Nov. 15, 1982).

The political nature of the exercise of this sovereign power, as the Court observed in *Matthews* v. *Diaz,* 426 U.S. 67, 81 (1976), flows from the fact that legislative decisions in this area "may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." The *Matthews* opinion, citing the definitive description of political questions contained in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), significantly observed that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization." 426 U.S. at 81-82.[4]

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[4] Decisions as to whether to deport an illegal alien or to allow the alien to remain permanently in the United States are closely akin to decisions as to foreign policy. The latter type decisions are considered

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The law is accordingly clear that the legislative power over aliens, including the power to determine which deportable aliens should be granted permanent resident status, "is of a political character and therefore subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 101, n. 21 (1976), citing the *Fong Yue Ting* ruling.[5] And legislative determinations in this sovereign area are deemed political determinations, functionally falling within the *Baker* v. *Carr* delineation of "political questions."

To summarize, the power to exclude or expel aliens, or to allow them to become permanent residents of this country, "being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting,* 149 U.S. at 713. It is "a sovereign power necessary to the safety of the country" and thus "is political and is vested in the political departments of the Government." *Mahler* v. *Eby,* 264 U.S. 32, 39–40 (1924). In short, any decision rendered on such a sovereign and political matter must be deemed to involve a "political question," and thus outside the realm of judicial competence.

The political nature of the legislative determination that at least one House "does not approve the granting of permanent residence in the United States" to Jagdish Rai Chadha assumes utmost significance in this case. It affects the problem whether Chadha has any standing to challenge the separation of powers implications of a polit-

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"political, not judicial," being "wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U.S. 103, 111 (1948). Such decisions are deemed "delicate, complex, and involve large amounts of prophecy . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*

[5] See also the statement in *Fiallo* v. *Bell,* 430 U.S. at 792, that "it is important to underscore the limited scope of judicial inquiry into immigration legislation."

ical judgment rendered by Congress on a discretionary matter so textually and totally committed by the Constitution to the Congress. It casts grave doubts on the constitutional capacity of the Ninth Circuit, or any court, to transfer to the Executive or the Judiciary any authority to render a final decision on Chadha's application to remain in the United States. And it raises equally grave constitutional problems about the capacity of the Ninth Circuit, under the guise of providing relief for a perceived constitutional flaw in the legislative rendition of a political decision, to make that political judgment itself.

The bottom point is that the Ninth Circuit's judgment does change Chadha's legal status, from that of a deportable alien to that of a permanent resident alien eligible for naturalization. The Ninth Circuit has substituted its judgment that Chadha should assume that new status for the political judgment of Congress that he should not be allowed to attain permanent residence in the United States. To make such a substituted judgment is to engage in a legislative act, a political act, an act that is not "susceptible of judicial determination," *Fong Yue Ting*, 149 U.S. at 715, particularly in the absence of statutory authorization. Pertinent here is the sentiment expressed in *McCray* v. *United States*, 195 U.S. 27, 61 (1904): "The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties."

Such interference with the performance of the political and legislative duties of the Congress will be "productive of nothing but mischief" and may well throw Section 244 of the Immigration Act, and the whole subject of discretionary cancellation of lawful deportation orders, "into the greatest confusion and disorder." *Cf. Decatur* v. *Paulding*, 14 Pet. 497, 516 (1840). Are deportable aliens like Chadha to have a "legal right" to obtain final waivers from the Attorney General, given proof of eligibility? Or must they now secure a court order approving their application for a change in their deportable status? Is the

Attorney General duty bound to follow the Ninth Circuit's legislative rewriting of Section 244 and issue orders "finally" cancelling the deportation proceedings of those aliens he finds eligible for "hardship" waivers? Who is to review and correct the Attorney General's possible abuse and disobedience of statutory standards in granting such final relief? Who is the aggrieved party in that situation, capable of invoking the corrective powers of the courts? And where is the jurisdictional grant that will permit courts to perform that function?

Much the same comments and questions can be raised about the "remedial" actions of the District of Columbia Circuit in two recent post-*Chadha* cases. That court, having found that the legislative disapproval device violates the positive lawmaking procedures of Article I, Section 7, proceeds itself to legislate into existence two disapproved agency regulations. In the *Consumer Energy Council* case, 673 F.2d at 479, the court orders that the Energy Commission's proposed regulation, disapproved by the House, "therefore shall take effect," subject only to possible reconsideration by the Commission. And in *Consumers Union of United States* v. *Federal Trade Commission* (D.C. Cir. No. 82-1737, Oct. 22, 1982), having answered certified questions by holding that a two-House concurrent resolution disapproval device is unconstitutional, the court proclaimed that its decision "will clear the way for the rule to become effective," presumably by action of the district court on remand.[6]

The *Chadha* decision thus seems to have spawned a rash of judicial lawmaking in its most obnoxious form. On the *Chadha* assumption that positive law changes are truly legislative in nature, the changes in Chadha's deportable status decreed by the Ninth Circuit collide directly with the separation of powers concept "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). It

[6] Slip opinion, p. 5 at n. 9.

matters not that the court deems it necessary to make law in order to provide a remedy for the perceived violation of the Constitution. Courts simply cannot legislate new positive law by "fashion[ing] a new rule or . . . provid[ing] a new remedy which Congress has decided not to adopt." *Id.*, at 97.

In all three instances, the courts have made a highly legislative determination in providing relief. In *Chadha*, the court made the legislative determination that an illegal alien shoud be allowed to remain permanently within the United States. In the *Consumer Energy* and *Consumers Union* cases, the court made the legislative determination that a proposed administrative regulation, that Congress has disapproved, must become effective as a matter of law. All these legislative remedies are being provided by the courts despite the absence of any statutory authority for so doing. And in each instance the choice being made by the courts, as in *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980),

> . . . is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Accord, Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646–647 (1981); *United States* v. *Topco Associates*, 405 U.S. 596, 611–612 (1972).

3. THE DECISION BELOW UNDERMINES THE "NECESSARY AND PROPER" POWER OF CONGRESS TO DEVISE PROCEDURES TO APPROVE OR DISAPPROVE "ACTS OF GRACE" SOUGHT BY DEPORTABLE ALIENS

The Ninth Circuit's opinion misreads the language and the purport of Section 244. It exhibits indifference to the

Section 244 scheme for dealing with applications for congressional "acts of grace," preferring to consider Section 244 as a scheme either "to revise particular administrative dispositions" or to enact "positive law that alters individuals' substantive rights." 634 F.2d at 434. As a result, the court of appeals assesses the constitutionality of Section 244(c)(2) in a false statutory and constitutional setting.

A. THE "ACT OF GRACE" CONCEPT

It bears reiteration that a deportable alien's application under Section 244 is directed toward securing a discretionary "act of grace" from the Congress. An alien found otherwise eligible literally seeks two "acts of grace," the first a temporary one from the Attorney General and the other a permanent one from the Congress. The Attorney General's "act of grace" is in the form of a "suspension of deportation," good only until Congress has acted pursuant to Section 244(c)(2).[7]

Jay v. *Boyd*, 351 U.S. 345, 354 (1956), determined that the petitioning alien, who must be subject to a lawful order of deportation, has at most a statutory "right to a discretionary determination [by the Attorney General] on an application for suspension." But, said the Court, a grant of such an application for temporary suspension

> . . . is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U.S. 211, 213.

The "act of grace" label applies equally to the second stage of the Section 244 proceeding, the consideration by Congress of the application for status adjustment. At that final point as well, the deportable alien cannot demand a

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[7] "If the Attorney General approves the application he must refer it to Congress, which has the final word." 2C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, § 7.9a, pp. 7–83 (1977).

favorable "act of grace" from Congress as "a matter of right."

The "act of grace" concept embodied in the whole of Section 244 explains why, when one House disapproves the grant of permanent resident status to the alien, no substantive or procedural right of the alien is impacted. That is also why a one-House disapproval resolution does not create any kind of a positive law change. No one can dispute Justice Jackson's dissenting observation in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 269 (1964), that a Section 244 applicant has no legal right "by virtue of constitution, statute or common law to have a lawful order of deportation suspended" by the Attorney General. By the same token, the applicant has no legal right to have a lawful order of deportation cancelled, or his staus adjusted, by a discretionary "act of grace" of Congress. Nor does the alien have any legal right not to have one House disapprove the grant of such relief.

B. THE "PUBLIC RIGHTS" CONCEPT

Another strand in the Section 244 fabric is the "public rights" doctrine, which played so prominent a role in the Court's decision last Term in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2869–2871 (1982). Application of the doctrine in this case serves to dismantle the Ninth Circuit's major thesis that Congress, in Section 244(c)(2), has somehow disrupted "an essential function of the judicial office," the function of correcting executive misapplication of Section 244, "especially the eligibility criteria." 634 F.2d at 429.[8]

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[8] The Ninth Circuit does not explain how the courts can presently correct abuses of discretion or misapplications of the eligibility criteria in the course of discretionary *grants* of temporary relief by the Attorney General. Neither the Attorney General nor the non-aggrieved alien would appeal such a grant. Moreover, the courts have not been given jurisdiction by Congress to review such grants. Only denials are appealable or reviewable. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968); *Jay* v. *Boyd*, 351 U.S. 345 (1956).

The "public rights" doctrine is traceable to *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855). The Court there held that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Prominent among such congressionally created "public rights" are those involving aliens who seek some form of relief from a threatened deportation or expulsion. Witness *Fong Yue Ting*, 149 U.S. at 715, which relied on *Murray's Lessee* in holding that Congress may commit the decision of deportation matters to the determination of executive officers, finally or only in the first instance. But, said the Court (at 714), there need only be

> . . . such opportunity for judicial review of their [the executive officers'] action as Congress may see fit to authorize or permit.

Thus there can be no vested constitutional function of the Judiciary to review and correct executive misapplications of congressionally created "public rights." The need for, or the existence and extent of, judicial involvement in such matters is solely for Congress to determine, in exercise of its discretion. See *Fong Yue Ting*, 149 U.S. at 712-713, using the *McCulloch* v. *Maryland* analysis of the Necessary and Proper Clause in explaining how Congress can either include or exclude courts from involvement in deportation matters.

Closely related to the "public rights" doctrine is the previously discussed principle of *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). The Court there announced that, in the "necessary and proper" distribution of the power to decide "public rights" matters, Congress "may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." And so in Section 244, Congress has chosen (1) to delegate to the Attorney General discretionary power to grant

temporary "suspensions of deportation," and to report such grants to the Congress, and (2) to "reserve to itself the power to decide" the sovereign and political issue whether a given deportable alien should be allowed to reside permanently in the United States. Congress could have delegated that final authority to executive officers or to the courts, but chose not to do so.[9]

Congress has in effect reserved to itself the "necessary and proper" power to correct executive abuses and misapplications of a plenary statute involving congressionally created discretion to allow a deportable alien to stay on our shores. The fact that Congress chose not to involve the judiciary in reviewing the Attorney General's grants of such discretionary relief does not mean that Congress has interfered with any constitutional or statutory function of the Judiciary. Courts have only those corrective powers, in the context of "public rights," that Congress sees fit to delegate to them.

The Ninth Circuit exceeded all precedent in asserting that it has a "duty" under Section 244 "to determine, at the conclusion of administrative proceedings [that resulted in the grant of temporary relief to Chadha], whether the Executive Branch has correctly applied the statute that establishes its authority." 634 F.2d at 430.

One direct answer to that erroneous assertion of "duty" is found in *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948). The Court there held that certain orders of the Civil Aeronautics Board that were subject to Presidential approval or disapproval could not be reviewed by the courts, for "until the President acts there is no final administrative determination to review." 333 U.S. at 112. And once the President has approved, the Board's recommended order escapes judicial review be-

[9] Chief Justice Marshall observed that "the maker of the law may commit something to the discretion of the other departments," and that Congress "may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Wayman* v. *Southard*, 10 Wheat. 1, 43, 46 (1825).

cause its vitality is then derived "from the exercise of unreviewable Presidential discretion" in a foreign policy matter. 333 U.S. at 113.

There is a remarkable similarity between the situation in the instant case and that in *Waterman*. Here, the Attorney General's grant of temporary relief is unreviewable because, *inter alia*, "there is no final administrative determination to review," even assuming an aggrieved party capable of seeking review. And since the Congress interposes on that temporary relief order a totally new and independent determination of its own, the Attorney General's order escapes judicial review because its vitality is then derived "from the exercise of unreviewable [Congressional] discretion" in a sovereign, political matter.

In the circumstances of this case, the "duty" referred to by the Ninth Circuit, the "duty" to review the Attorney General's grant of temporary relief which has only the force of a recommendation to Congress, would be, to paraphrase *Waterman*, 333 U.S. at 113,

> . . . to render an advisory opinion in its most obnoxious form—advice that the [Congress] has not asked, tendered at the demand of a private litigant, on a subject concededly within the [Congress'] exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive.

C. THE DELEGATION CONCEPT

It should now be evident that Section 244 is a "necessary and proper" law by which Congress has delegated certain functions to the Attorney General in processing applications for deportation waivers, or "acts of grace." Some of those delegated functions are final in nature, such as the function of denying applications by aliens who do not meet the eligibility criteria or do not otherwise satisfy the Attorney General's discretionary concerns. Others are limited and conditional in nature, such as the power to grant temporary suspensions of deporta-

tion pending final action by the Congress itself pursuant to Section 244(c)(2).

As we have seen, Congress can delegate to, or withhold from, the other branches such congressionally created functions as it deems "necessary and proper." Any delegated function thus exercisable by the Executive or the Judiciary "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). This congressional power of delegation has implications that render dubious much of what the Ninth Circuit says about the Section 244(c)(2) interference with executive functions.

Since the power delegated to the Attorney General, in terms of the grant of Section 244 relief, is limited to granting temporary suspensions of deportation, subject to further action by Congress, the Attorney General is duty bound to respect that limitation. See the Article II, Section 3, obligation of the Executive to "take Care that the Laws be *faithfully* executed" [emphasis added]. Simply because Congress has not delegated to the Attorney General the power to grant final relief to such aliens, having reserved that power to itself, does not create what the Ninth Circuit calls legislative "trespasses upon central functions of the Executive." 634 F.2d at 432. What are involved are delegated functions of the Executive, perhaps softened by a "quasi," that find their source in Section 244 of the Immigration Act. They are not traceable to Article II.

The Executive has no vested constitutional power to deal with deportable aliens. And it cannot be that the "central functions of the Executive" demand that the Executive Branch be given the sovereign and political function of finally determining which deportable aliens should be granted permanent residence. Such a transfer of functions from the Congress to the President is antithetical to the Constitution, and to the Necessary and

Proper Clause and the sovereign and political power of Congress over aliens.

Nor can it be properly said that, by reserving this final "act of grace" function to itself, Congress is performing an executive function, or interfering with the administration of Section 244. How can Congress interfere with a function that has never been delegated to the Executive?

Perhaps the "central functions of the Executive" mentioned by the Ninth Circuit are those functions "considered implicit in the nature of the President's office." *Nixon* v. *Fitzgerald,* 102 S.Ct. 2690, 2701 (1982). If so, suffice it to say that the "act of grace" function embodied in Section 244(c)(2) is not of that implicit executive nature.

4. THERE IS A FATAL ABSENCE OF (A) ARTICLE III STANDING TO INITIATE THIS CONSTITUTIONAL CHALLENGE, AND (B) ADVERSENESS BETWEEN THE PARTIES BELOW ON CONSTITUTIONAL ISSUES

The negative characteristic of H. Res. 926 also underscores the standing and adverse party defects in this case. Indeed, "the preservation of these [Art. III] limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important. . . ." *Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59, 96 (1978) (Rehnquist, J, concurring in the judgment).

A. CHADHA'S LACK OF STANDING

The Ninth Circuit makes a futile effort to fit the square pegs of Chadha's legal position into the round holes of the Article III standing doctrine. As most recently summarized in *Valley Forge Christian College* v. *Americans United,* 102 S.Ct. 752, 758 (1982), that doctrine provides that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979),

and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

The opinion below bears witness to the high degree of factual and statutory manipulation needed to find the existence of Article III standing in this case.

(1) *The "actual or threatened injury."* The Ninth Circuit states "that Chadha has indeed suffered injury in fact: the Attorney General will deport him should his challenge fail." 634 F.2d at 417. The injury, in other words, is said to be the deportation that Chadha will suffer at the hands of the Attorney General should the challenge to Section 244(c)(2) fail.

Deportation can of course be an injury, for standing purposes, when an alien challenges some provision of law that creates deportability. But Chadha makes no such challenge. He concedes the legality of his deportation order. He asserts no individual constitutional right to escape deportation or to become a permanent resident of the United States. He makes no constitutional objection to the Attorney General's intent or threat to deport should the challenge to Section 244(c)(2) fail.[10] To put it mildly, deportation as an Article III injury has evaporated from this litigation.

If deportation be not the injury, where does the search for "actual or threatened injury" next lead us? If there is an injury to be found, this Court has said, it must come from a "showing that the feature of the act complained of operates to deprive him of some constitutional right." *Aikens* v. *Kingsbury*, 247 U.S. 484, 489 (1918). And so the

[10] The Attorney General's role in executing lawful deportation orders is "a ministerial act which the law enjoins ona particular officer for a particular purpose," *Marbury* v. *Madison*, 1 Cranch 137, 158 (1803). In *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923), the Court stated that Article III standing cannot be extracted from the fact "that officials of the executive branch of the government are executing and will execute an act of Congress asserted to be unconstitutional."

inquiry must be whether Chadha shows that Section 244(c)(2), the only feature of the Immigration Act that he challenges, so operates as to deprive him of a constitutional right. No such showing is made or can be made.

Section 244(c)(2), we have seen, does no more than establish congressional procedures for saying "yes" or "no" to deportable aliens who seek congressional "acts of grace," excusing them from compliance with lawful deportation orders. The grant of such requested relief "is manifestly not a matter of right under any circumstances," *Jay* v. *Boyd*, 351 U.S. at 354. From which it follows that the denial of a requested "act of grace," illustrated by the adoption of H. Res. 926, does not affect or deny any kind of legal right, constitutional or otherwise, that Chadha might assert. To conclude otherwise would be to impose some kind of a constitutional duty on Congress to grant relief to all eligible deportable aliens. That proposition is intolerable.

Section 244(c)(2), in other words, is confined to matters of legislative procedures; it does not deal with or affect any individual rights. That means that Chadha does not and cannot meet that portion of the "injury" concept that requires a showing by the complaining party "that he is within the class of persons who will be concretely affected," *Blum* v. *Yaretsky*, 102 S.Ct. 2777, 2783 (1982), by the challenged statutory provision. As this Court has so often said, one who would strike down a statute as violative of the Constitution "must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 544–545 (1914); *and see Hatch* v. *Reardon*, 204 U.S. 152, 160 (1907); *Smiley* v. *Kansas*, 196 U.S. 447, 457 (1905); *Southern Railway Co.* v. *King*, 217 U.S. 524, 534 (1910); *Heald* v. *District of Columbia*, 259 U.S. 114, 123 (1922); *Red River Valley Bank* v. *Craig*, 181

U.S. 548, 558 (1901); *Data Processing Service* v. *Camp*, 397 U.S. 150, 153 (1969).

If further evidence is needed of the fact that Chadha is not within the class of persons concretely affected by Section 244(c)(2), it is found in the nature of Chadha's constitutional challenge. He attacks the statute *solely* in terms of the inter-Branch concerns with the general separation of powers doctrine and with the power of Congress to enact legislation without any presentment to, and involvement by, the Executive. The real class of those affected by the operation of Section 244(c)(2) would appear to be the Executive and the Judiciary, and not any individual citizen or alien. Chadha is left in the position of a plaintiff who has no rights of his own to protect, *see Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1881), and is thus forced to assert and volunteer the interests and rights of third parties who are fully capable of protecting their own concerns. *See Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953).

In short, Chadha has suffered no Article III "injury" by reason of the passage of H. Res. 926. Section 244(c)(2) has been applied in such a negative manner as to leave Chadha's legal status as a deportable alien completely unaltered. That he is disappointed in the failure of Congress to confer an "act of grace" upon him is understandable. Such disappointment, however, is but a psychological consequence of the negative operation of Section 244(c)(2). And a psychological consequence, as this Court recently made clear in *Valley Forge*, 102 S.Ct. at 765, "is not an injury sufficient to confer standing under Art. III."

Even when we focus on Chadha's disappointment in the failure of Congress to approve a permanent continuance of the suspension of deportation ordered by the Attorney General, there is no Article III "injury" to be found. *The Chinese Exclusion Case*, 130 U.S. 581, 620 (1889), teaches that there is no constitutional right to "a continued suspension of the exercise of a governmental power [to deport]." If rights cannot be crafted from "expectations of

benefits from the continuance of existing legislation," *id.*, even less can rights be generated out of the loss of expectations of benefits from proposed legal changes never enacted. Chadha thus has no injury stemming from his dashed hopes that Congress would adopt a Section 244 "act of grace."

(2) *Injury that results from, or is fairly traceable to, the challenged "putatively illegal conduct of the defendant."* The Ninth Circuit's treatment of this second prong of the Article III standing doctrine consists of the erroneous statement that "Chadha can directly trace his deportation to the operation of section 244(c)(2)." 634 F.2d at 417.

Deportation, we have seen, is not the relevant injury in this case. Even if it were, Chadha's deportation is not directly traceable to the operation of Section 244(c)(2). Rather, it is traceable to the fact that Chadha remained in the United States for a longer time than permitted by the student visa provisions of Section 101(a)(15)(J). Chadha admits that fact and thus admits that he is deportable.

The major fault in the court's handling of the second prong is the failure to insist that there be a causal nexus between the injury and "the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979). It is not enough to trace a link between the injury and what the court describes as "the operation of section 244(c)(2)." Such operation, if it is to serve as the cause of the plaintiff's injury, cannot be viewed in isolation. The operation, in other words, must be an integral part of the conduct of the defendant, the other party to the litigation. That is why this Court's opinions on standing are replete with such statements as tracing the injury "to the challenged action of the defendant," *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 41 (1976), or showing that the injury is "a result of the putatively illegal conduct of the defendant," *Gladstone, supra,* at 99. Were it otherwise, the causation factor would be converted into a search for an offending statute,

rather than an offending party defendant. Put differently, the defendant must be a proper party to defend the statutory provision when the provision is challenged by an injured plaintiff.

The causation prong of the standing doctrine is lacking in this case. The Immigration and Naturalization Service, an agent of the Attorney General, is the sole party defendant (or respondent in the proceeding below). But neither the INS nor the Attorney General is assigned any functions in the operation of Section 244(c)(2), the provision Chadha challenges. Since Chadha is not challenging any deportation provisions, it is irrelevant that the INS and the Attorney General are charged with executing such provisions. What is critical is the fact that the two Houses of Congress, acting separately or together, perform all actions and functions under Section 244(c)(2). But they were not named as parties defendant or respondent in the review proceedings before the Ninth Circuit. The two Houses appeared there only as *amici.*

The causation requirement received its final *coup de grace* in this case when the INS, as the sole party respondent, determined not to defend the constitutionality of Section 244(c)(2). In reality, the INS joined forces with Chadha in attacking "the putatively illegal conduct" of the Congress, or at least the House of Representatives, in the operation of Section 244(c)(2). The case, as instituted in the Ninth Circuit, thus found itself without an adverse party defendant, a party whose challenged conduct could be said to have injured the plaintiff.

On the causation factor alone, this case is an Article III nightmare.

(3) *Redress of the claimed injury by exercise of the court's remedial powers.* The Ninth Circuit states that the third prong of the standing doctrine has been satisfied, the prong that requires a showing that "the exercise of the Court's remedial powers would redress the claimed injuries" or that "the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co.* v.

Carolina Environmental Study Group, 438 U.S. 59, 74, 79 (1978). And how has this requirement been satisfied here? Very simple, says the court, 634 F.2d at 417–418:

> Thus, if section 244(c)(2) is invalidated, the original suspension under section 244(a) will be reinstated and Chadha's status adjustment will become permanent.

This is an analytically unsound position. As demonstrated in the House brief in chief (pp. 28–33), the Section 244 scheme is tightly integrated, particularly with respect to the *grant* of permanent relief to the deportable alien. Unless Congress approves the grant of permanent relief, pursuant to the procedures set forth in Section 244(c)(2), there is no statutory way by which "the original suspension under section 244(a) will [or can] be reinstated and Chadha's status adjustment will [or can] become permanent." Congress has reserved to itself, in Section 244(c)(2), the final sovereign and political power to determine which deportable aliens shall have their status adjusted so as to attain permanent residence in the United States. Section 244(a) cannot be construed to take that power away from Congress and lodge it in the Attorney General or in the Federal courts.

By invalidating Section 244(c)(2), the Ninth Circuit makes the rest of Section 244 unworkable insofar as granting permanent status adjustment is concerned. Section 244(c)(2) is simply not severable in this respect. It is the essential core of procedure for legislative exercise of this great sovereign power. Take out Section 244(c)(2), and Chadha is left with a temporary suspension of deportation, a suspension that can never become final without congressional action. Statutorily and realistically, Chadha retains his deportable status.

Thus, in awarding Chadha the permanent status adjustment he could not get from Congress, the Ninth Circuit is forced to rewrite Section 244. And the court, in purported exercise of its remedial powers, performs the extraordinarily sovereign and political act of ordering the

cancellation of Chadha's deportation and directing that he be allowed to reside permanently in the United States, with immediate naturalization eligibility. As we have seen, this is legislative action. It is totally beyond the Article III ken of the Judiciary.

So, when the court proclaims that it can redress Chadha's claimed injuries so as to satisfy the third prong of the standing doctrine, the court does so only by force of a judicial fiat that is constitutionally unwarranted. The absurd result is thereby reached of awarding improper relief to an individual who has no standing to litigate, who has suffered no cognizable injury at the hands of any other party to the case, and who is a total stranger to the separation of powers controversy that he raises.

Chadha brings to this case nothing but the psychological disappointment generated by the negative nature of H. Res. 926. That disappointment does not qualify as a "personal stake" in the requirement of the Article III law of standing that the party seeking relief must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). That the Ninth Circuit did improperly award relief to Chadha only exacerbates Chadha's lack of a "personal stake" in the outcome of an inter-Branch controversy. Chadha is thus unable to contribute anything to the sharpening of that constitutional debate other than the constitutional law essays contained in his brief.

The loose standing requirements reflected in the Ninth Circuit's opinion in *Chadha* have been followed and applied in subsequent litigation in which the legislative review device has been challenged. Thus in the *Consumer Energy Council* case, 673 F.2d 425, the District of Columbia Circuit entertained and resolved a challenge to a one-House disapproval of a proposed Energy Commission rule. That challenge was brought by consumer organizations

on the bare allegation that, had the rule been allowed to become effective, consumers would have benefited from lower natural gas prices.[11] In similar vein, the District of Columbia Circuit, in *Consumers Union of United States* v. *Federal Trade Commission* (D.C. Cir. No. 82-1737, Oct. 22, 1982), resolved a challenge to a two-House disapproval of a proposed FTC Used Car Rule at the instance of consumer organizations, many of whose members might be expected to purchase used cars in the future. The standing requirement was considered satisfied because, had the FTC Used Car Rule been allowed to become law, such potential purchasers would then benefit from the disclosures required by the rule.

The *Chadha* opinion below has indeed spawned a revolution in the Article III law of standing. Under the *Chadha* dispensation, any individual or organization disenchanted or disappointed by the failure of Congress to enact legislation that would be of benefit to that individual or organization has Article III standing to challenge the procedures by which Congress said "no." That is a most frightening prospect.

Allowing standing to those disappointed by the refusal of Congress to confer some benefit upon them was never within the contemplation of the article III "case or controversy" concept. This Court long ago said that it "never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U.S. 339, 345 (1892). The time has come to repeat that sentiment.

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[11] This standing problem is one of the Questions Presented (No. 4) by the House in its pending petition for writ of certiorari in No. 82-209, *United States House of Representatives,* Petitioner v. *Consumer Energy Council of America, et al.,* Respondents.

The House also intends to pursue this standing problem when the *Federal Trade Commission* ruling of the District of Columbia Circuit reaches this Court for review.

B. THE ABSENCE OF ADVERSE PARTIES

Since the day in March of 1977 when Chadha filed in the Ninth Circuit a petition to review his final deportation order, this has been an ill-starred "case or controversy." A prime defect has been the absence of any adverseness between parties on the sole question raised in the petition to review, the constitutionality of Section 244(c)(2). The only two parties to the proceeding, Chadha and the INS, have been as one in protesting the validity of that section, as well as H. Res. 926. See House brief in chief, pp. 46–47; House reply brief, pp. 12–13; House motion to dismiss INS appeal (No. 80–1832), pp. 12–14.

This lack of adverseness between Chadha and the INS has several manifestations:

(1) Chadha has no real controversy with the INS. Both Chadha and the INS agree he is deportable. Both agree that the final deportation order is in proper order and executable. Both agree, however, that the order should be set aside because of the alleged invalidity of Section 244(c)(2). Both agree, and for the same reasons, that Section 244(c)(2) is unconstitutional, and both request a declaration to that effect. Thus the area of agreement between Chadha and the INS covers all claims, all issues and all requests for relief in this proceeding.

This is a classic instance of a stillborn "case or controversy," there being no adverseness at the start of the proceeding in the Ninth Circuit. This court's decision in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), draws the proper conclusion: "There is, therefore, no case or controversy within the meaning or Art. III of the Constitution."

Without explaining away the *Moore* precedent, the Ninth Circuit opines that any contention that there is no adverseness between Chadha and the INS "misconceives the adverseness requirements." 643 F.2d at 419. Then having defined adverseness as a real and substantial controversy admitting of specific relief, the court constructs an adverseness said to be present here:

> Here, Chadha has asserted a concrete controversy, and our decision will have real meaning: is we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him.

This is the same "bootstrap" reasoning used by the court to confer Article III standing on Chadha. It confuses party adverseness as to issues with consequences of judicial resolution of issues. We have already seen that a declaration of invalidity of Section 244(c)(2) does not necessarily carry with it the consequence that Chadha "will not be deported." It does carry that consequence only if the court misconstrues the remainder of Section 244 and engages in an exercise of judicial legislation. The lack of party adverseness is not cured by innovative or unwarranted judicial remedies.

The court adds the *in terrorem* comment that acceptance of the non-adverseness argument would mean "that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional" and that where, as here, "the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds." 634 F.2d at 420. Suffice it to repeat that the deportation order is enforceable here on grounds quite unrelated to the validity or invalidity of Section 244(c)(2). A Section 244 application seeks a waiver, an "act of grace," of the alien's obligation to comply with a lawful order of deportation. If the requested waiver is denied, the INS intention to enforce the order is no greater or less than if no waiver had been sought.

(2) The lack of adverseness is also seen in the nature of the constitutional challenge made by Chadha. He rests his attack on Section 244(c)(2) solely on a general separation of powers proposition that implicates the respective powers of the three coordinate branches of the federal government. He does not claim any personal involvement in that doctrine or in the claim that Congress has sought

to exercise any function expressly vested in the Executive or the Judiciary. *Cf. Buckley* v. *Valeo,* 424 U.S. 1 (1976) (appointment power of the President). And he stakes his all on the side of the Executive in the long-standing inter-Branch debate over the validity of the legislative review device. He has truly volunteered to present the Executive's position on the matter. All of which accounts for the alacrity with which the INS, as representative of the Executive Branch, joins Chadha's constitutional challenge. As happened in *Smith* v. *Indiana,* 191 U.S. 138, 148 (1903), "the celerity of the proceedings and the admissions of counsel indicate that the suit was begun and carried on for the purpose of testing the constitutionality of the law, and that the litigation was at least not an unfriendly one."

(3) It follows that if the INS were realigned according to its position on the constitutional issue, the INS would be a co-plaintiff with Chadha. That would leave the suit below as one between two plaintiffs and no defendants, which is further proof of non-adverseness. The lack of any real adverse party was again made evident when the Ninth Circuit invalidated Section 244(c)(2), as both Chadha and the INS had urged. That decision made both Chadha and the INS prevailing and non-aggrieved parties, a position they retain to this day before this Court. Both parties seek full affirmance of the decision below.

(4) At no time has Chadha's action been focused on the enforcement of any legal obligation or right with respect to the deportation order or the procedures of Section 244(c)(2). He has none to assert. *Cf. Pope* v. *United States,* 323 U.S. 1, 11 (1944). He appears to have brought the action either to assert a generalized "good government" interest in that review device, *see United States* v. *Richardson,* 418 U.S. 166 (1974), or to accommodate the Executive Branch. It now is evident, after more than six years of litigation on the validity of this device, that the Executive Branch cannot discover an appropriate avenue for bringing its own lawsuit against the Legislative Branch

to obtain a judicial declaration of invalidity.[12] It thus is forced to "ride piggyback," *Clark* v. *Valeo,* 559 F.2d 642, 664 (en banc) (D.C.Cir. 1977) (Leventhal, J., concurring), on such opportune suits as Chadha's.

(5) The missing party in interest in the proceeding below was the Congress of the United States. It was also the indispensable party, for it was its legislative rights that were at stake. The Attorney General having abandoned defense of Section 244(c)(2) and gone on the offense, Congress was forced to fend for itself in defending that statutory provision, a rather awkward role for a legislative body to play.

The difficulty here is that neither House was made a party to Chadha's review proceeding; and neither House intervened as parties before the court below.[13] Rather, they were invited to brief and argue as *amici.* This led to the strange doctrine announced by the Ninth Circuit that since "Chadha has asserted a concrete controversy" it suffices that a real party to that constitutional controversy appears in an *amicus* role with "argument for the constitutionality of the statute ably advanced by amici." 634 F.2d at 419–420.

There has never been a case of this dimension so conceived and pursued in non-adverseness. *Amici* simply cannot fulfill the position of litigants asserting legal rights "in actual controversies." *Liverpool Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39 (1885). Article III requires that a controversy *at the beginning of liti-*

[12] It is questionable whether government officials have standing to challenge the constitutionality of statutes they are sworn to execute and defend. See *Marshall* v. *Dye,* 231 U.S. 250, 257–258 (1913); *Columbus & Greenville Ry.* v. *Miller,* 283 U.S. 96, 99–100 (1931), where state officials were held to have no standing to invoke this Court's jurisdiction to resolve the assaults of the officials on state statutes, assaults made in their official rather than personal capacities.

[13] The fact that the House and Senate intervened in the Ninth Circuit *after* judgment, in order to have standing to petition this Court for review, could not retroactively invest the prior proceedings with the necessary adverseness.

gation be a controversy between named parties, a controversy that is "definite and concrete, touching the legal relationships of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). In the words of the commentators 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3530, at 164, 166-167 (1975),

> All models of cases and controversies assume the presence of at least two genuinely adversary parties. . . . The principle remains today that if both parties affirmatively desire the same result, no justiciable case is presented [citing the *Moore* decision]. Cases conceived in cooperation, however, may be saved by intervention of a genuine adversary to represent the rights that might otherwise be affected inadvisedly.

But the instant case does not meet such justiciable models. It involves nothing more than two parties, not in genuine controversy with each other, who join forces and share a desire to affect and prejudice the legal interests of nonparties. By any other name, the decision below is a pure advisory opinion.

(6) Underlying all these non-adverse party factors is the negative nature of operation of the statute under attack by Chadha and the INS. As epitomized by H. Res. 926, Section 244(c)(2) has not operated to affect any legal rights of Chadha and has not generated any genuine controversy between Chadha and the INS. Both parties are foreign to the operation and impact of Section 244(c)(2). One cannot construct a viable "case or controversy" out of such an abstract and non-adversary constitutional issue.

(7) Finally, the so-called *Chadha* model of nonadversariness is inevitably leading to a marked change in "case or controversy" jurisprudence, at least in the area of litigation respecting the legislative review device. In reliance on the loose *Chadha* model, the Executive Branch is becoming bolder in its efforts to secure declarations of invalidity outside the normal Article III requirements of standing and adverse parties. Witness the following:

Case	Position of actual parties to case	Position of real parties to inter-Branch controversy
Chadha v. *INS*, 634 F.2d 408 (9th Cir. 1980)..	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch represented by INS.
	2. INS, an Executive Branch agency, joins in plaintiff's inter-Branch claim.	2. Legislative Branch appears through House and Senate, as *amici*.
Consumer Energy Council v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch, *sub nom.* United States, appears as *amicus* in support of the plaintiffs.
	2. FERC, an independent agency, takes no position on inter-Branch controversy.	2. Legislative Branch appears through House and Senate, as *amici*.
Consumers Union v. *FTC, et al.* (D.C. Cir. No. 82-1737, Oct. 22, 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch appears as nominal party defendant, *sub nom.* FTC.
	2. Executive Branch takes over representation of FTC, an independent agency, and joins in plaintiffs' inter-Branch claim.	2. Senate and House named as parties defendant; this raises unresolved problem of capacity of Congress to be sued without express consent.
	3. Senate and House named as parties defendant and support constitutionality of legislative review device.	
Pacific Legal Foundation v. *Watt*, 529 F. Supp. 982 (D. Mont. 1981); 539 F. Supp. 1194 (D. Mont. 1982).	1. Private plaintiff raises inter-Branch controversy.	1. Executive Branch appears through defendant executive officers.
	2. Executive Branch, representing executive officers, agrees with plaintiffs' constitutional claim.	2. Legislative Branch appears through Senate and House committees, as *amici*.
American Foreign Service Assn. v. *McPherson* (D.C.D.C. Civil Action No. 81-2073).	1. Private plaintiff challenges validity of A.I.D. regulation that was made effective without being submitted to Congress for approval.	1. Executive Branch appears through defendant executive officer.

Case	Position of actual parties to case	Position of real parties to inter-Branch controversy
	2. Executive Branch, representing A.I.D. Administrator, defends regulation on ground that "Congressional review of the proposed [regulation] changes was neither necessary nor constitutional," relying on *Chadha* decision. See defendant's memorandum in support of motion to dismiss, p. 16, fn.	2. Legislative Branch does not appear in any capacity.
Williams v. *Pierce* (S.D.N.Y. Civil Action No. 82 Civ. 5224).	1. Private plaintiffs challenge validity and effectiveness of a HUD "interim final rule" that HUD put into effect despite an adverse deferral resolution adopted by a House committee, pursuant to statute.	1. Executive Branch appears through executive defendant officer.
	2. Executive Branch, representing executive officers, defends the effectiveness of the "interim final rule" on the basis of advice from the Department of Justice that "both before and after passage of § 7(o)(3) * * * the 90-day deferral mechanism in that statute is unconstitutional," citing the *Chadha* ruling. See federal defendants' memorandum in opposition to plaintiffs' motion for preliminary injunction, pp. 9–10.	2. Legislative Branch does not appear in any capacity.

What we are seeing is a virtual breakdown in the use of the genuine adversarial system for adjudicating inter-Branch separation of powers problems. Particularly disturbing is the recent tendency of the Executive Branch to ignore statutory requirements for submission of executive regulations to Congress for final approval or disapproval. *Cf.* Article II, Section 3: the President "shall take Care that the Laws be faithfully executed."

The *Chadha* ruling is indeed bearing bitter fruit.

CONCLUSION

For all these reasons, supplementing those previously presented in the briefs and motions of the House and Senate, the judgment of the Ninth Circuit should be reversed and/or vacated. The threshold justiciability problems in this case are of such magnitude as to warrant dismissing Chadha's petition for review of the deportation order, without reaching the inter-Branch separation of powers dispute. But if that dispute be reached, the House of Representatives requests that the judgment below be reversed on the ground that Section 244(c)(2) is a proper exercise of congressional power to delegate and/or retain quasi-legislative functions pursuant to a duly enacted plenary statute.

Respectfully submitted.

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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

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Appellee-petitioner United States Senate moves for leave to file the accompanying Supplemental Brief on Reargument of the United States Senate, for the following reasons:

1. The Court heard arguments in these cases on February 22, 1982. On July 2, 1982, the Court restored these

cases to the calendar for reargument. These cases have been calendared for reargument on December 7, 1982.

2. Since the filing of opening briefs in these cases, the United States Court of Appeals for the District of Columbia Circuit has decided two cases on the constitutionality of provisions for legislative review: *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), *appeals and petitions for certiorari filed*, 50 U.S.L.W. 3896 (U.S. April 29, 1982) (No. 81-2008, etc.); and *Consumers Union of U.S., Inc.* v. *Federal Trade Commission*, No. 82-1737 (D.C. Cir. decided Oct. 22, 1982) (en banc), *notices of appeal filed*, (D.C. Cir. Nov. 4, 1982). In the Federal Energy Regulatory Commission case, the District of Columbia Circuit held that a provision for one-House disapproval of a rule under the Natural Gas Policy Act of 1978 was unconstitutional. In the second case, the District of Columbia Circuit held that a provision for two-House disapproval of a trade regulation rule of the Federal Trade Commission was unconstitutional.

3. The principal basis of these two decisions is that statutory authority for legislative review, whether by one or two Houses of Congress, violates the Presentation Clause. This theory of decision of the District of Columbia Circuit is far broader than the separation of powers basis upon which the Ninth Circuit ruled on section 244 of the Immigration and Nationality Act; that broader theory has enormous implications for legislative and executive accommodations under numerous statutes.

4. The accompanying Supplemental Brief on Reargument provides to the Court historical information with which to evaluate the claim that the Presentation Clause is a basis for generally invalidating provisions for legislative review. In Part I, we describe the intent of the Framers in adopting the second part of the Presentation Clause, Article I, Section 7, Clause 3, which requires that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be neces-

sary . . . shall be presented to the President. . . ." In Part II, we describe the historical evolution of legislative review over five major periods and uses during the last fifty years: the Reorganization Acts; World War II and the Postwar Period; Impoundment, War, and National Emergency Powers; Energy; and Rulemaking. The conclusion offered by the Supplemental Brief is that the Court should not accept a sweeping challenge to all legislative review provisions based on the Presentation Clause. We state our reasons why the Court should instead focus on the issue of separation of powers and judge the constitutionality of particular legislative review provisions in their different constitutional and statutory contexts.

5. Rule 35.5 of this Court provides that a party may file a supplemental brief to present intervening matters that were not available in time to have been included in his brief in chief. One of the decisions of the District of Columbia Circuit was issued after the February 22, 1982 argument in these cases; the other was issued after our opening brief and only two weeks before the filing of our reply brief. We are requesting leave to file the accompanying Supplemental Brief, instead of relying exclusively on Rule 35.5, for the reason that the Supplemental Brief contains an extensive presentation of historical material not previously presented by the parties.

WHEREFORE, the appellee-petitioner United States Senate requests leave to file the accompanying Supplemental Brief on Reargument of the United States Senate.

Respectfully submitted,

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CONTENTS

	Page
Table of Authorities	I
Introduction	1
Argument:	
I. In adopting the presentation clause, the Framers were concerned only with the methods for enacting new legislation, not with legislative review pursuant to previously enacted law	4
II. The evolution of legislative review shows that its function has been to preserve the balance of the elected branches	9
A. Reorganization Act	11
B. World War II and the Postwar Period	14
C. Impoundment, War, and National Emergency Powers	20
D. Energy	27
E. Rulemaking	32
Conclusion	38
Appendix A	41
Appendix B	45

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Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954)	16
American Textile Manufacturers Institute, Inc. v. *Donovan*, 452 U.S. 490 (1981)	10
Arizona v. *California*, 373 U.S. 546 (1963)	9, 29
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936)	2
Atkins v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978)	21
Buckley v. *Valeo*, 424 U.S. 1 (1976)	35

Cases—Continued

	Page
Consumer Energy Council of America v. *Federal Energy Regulatory Commission*, 673 F. 2d 425 (D.C. Cir. 1982), *appeals and petitions for certiorari filed*, 50 U.S.L.W. 3896 (U.S. April 29, 1982) (No. 81-2008, etc.)	2, 28, 32
Consumers Union of U.S., Inc. v. *Federal Trade Commission*, No. 82-1737 (D.C. Cir. Oct. 22, 1982) (en banc), *notices of appeal filed*, (D.C. Cir. Nov. 4, 1982)	2, 32, 35
Currin v. *Wallace*, 306 U.S. 1 (1939)	13
Dames & Moore, Inc. v. *Regan*, 453 U.S. 654 (1981)	27
Federal Election Commission v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981)	35
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	33
Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, 448 U.S. 607 (1980)	10, 33
Isbrandtsen-Moller Co. v. *United States*, 300 U.S. 139 (1937)	13
National Petroleum Refiners Assn. v. *FTC*, 482 F. 2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974)	33
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977)	11
North Haven Bd. of Education v. *Bell*, 102 S. Ct. 1912 (1982)	37
Ohio Association of Community Action Agencies v. *Federal Energy Regulatory Commission*, 654 F. 2d 811 (D.C. Cir. 1981)	31
Powell v. *McCormack*, 395 U.S. 486 (1969)	7
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	11
Swayne & Hoyt, Ltd. v. *United States*, 300 U.S. 297 (1937)	13
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915)	11
United States v. *Nixon*, 418 U.S. 683 (1974), *quoting Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	39
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	11
Constitution and Statutes:	
Article I Section 7, Clause 3	3

Constitution and Statutes—Continued	Page
Article I, Section 8, Clause 11	22
Article II, Section 2, Clause 1	22
Act of November 16, 1973, Pub. L. No. 93-153, Section 10, 87 Stat. 576, 582, 30 U.S.C. 185(u)	30
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Title IV, 88 Stat. 535	37
Section 509, 20 U.S.C. 1232(d)(1)	37
Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, Section 103, 93 Stat. 749, 753, 42 U.S.C. 6421(c) (Supp. IV 1980)	31
Energy Policy and Conservation Act, Pub. L. No. 94-163, Sections 159, 201, 401(a) and 455, 89 Stat. 871, 886, 890, 941, and 950 (1975), 42 U.S.C. 6239 and 6261, 15 U.S.C. 757 and 760a	30
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Immigration and Nationality Act, section 244(c)(2)	1
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Constitution and Statutes—Continued Page

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Natural Gas Policy Act of 1978, Pub. L. No. 95-621, Section 202(c), 92 Stat. 3350, 3372, 15 U.S.C. 3342(c) (Supp. IV 1980) 32
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Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, Section 6, 71 Stat. 5, 6, 22 U.S.C. 1965 (1957) 20
Service Extension Act of 1941, ch. 362, 55 Stat. 626 15
Trade Expansion Act of 1962, Pub. L. No. 87-794, Section 351, 76 Stat. 872, 899, 17 U.S.C. 1981 20
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War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 50 U.S.C. 1544 (1973) 8, 9
Section 2(c), 50 U.S.C. 1541(c) 23
Section 5(b), 50 U.S.C. 1544(b) 23
Section 5(c), 50 U.S.C. 1544(c) 9, 23, 24
Pub. L. No. 83-3, 67 Stat. 4 (1953) 14
Pub. L. No. 85-286, 71 Stat. 611 (1957) 14
Pub. L. No. 87-18, 75 Stat. 41 (1961) 14
Pub. L. No. 88-351, 78 Stat. 240 (1964) 14
Pub. L. No. 89-43, 79 Stat. 135 (1965) 14
Pub. L. No. 89-554, Section 906, 80 Stat. 378, 396 (1966) 14
Pub. L. No. 91-5, 83 Stat. 6 (1969) 14
Pub. L. No. 92-179, 85 Stat. 574 (1971) 14

Constitution and Statutes—Continued Page
H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, Section 3, 78 Stat. 384 (1964), *repealed*, Pub. L. No. 91-672, Section 12, 84 Stat. 2053 (1971). 20, 21
Pub. L. No. 95-17, Section 906, 91 Stat. 29, 32 (1977)... 14
Pub. L. No. 96-230, 94 Stat. 329 (1980) 14
State Constitutions:
Pa. Const. (1776) 5
Va. Const. (1776) 6
Delaware Const. Art. 7 (1776) 6
N.C. Const. Art. XLV (1776) 6
S.C. Const. Art. VII (1776) 6
Ga. Const. Arts. XXVII, XXVIII (1777) 6
Congressional Documents:
S. 373, 93d Cong., 1st Sess., adopted by the Senate, 119 Cong. Rec. 15255 (1973) 25
S. 440, 93d Cong., 1st Sess 23
S. 1541, 93d Cong., 2d Sess 25
S. 2589, 93d Cong., 1st Sess 30
H.R.J. Res. 542, 93d Cong., 1st Sess. 20, 22
H.R. 7130, 93d Cong., 1st Sess., adopted by the House, 119 Cong. Rec. 39740 (1973) 25
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S. Rep. No. 549, 91st Cong., 1st Sess. (1969) 19
S. Rep. No. 498, 93d Cong., 1st Sess. (1973) 29, 30
S. Rep. No. 549, 93d Cong., 1st Sess. (1973) 29
S. Rep. No. 763, 93d Cong., 2d Sess. (1974) 36
S. Rep. No. 1018, 96th Cong., 2d Sess., pt. 2 (1980) 37
S. Rep. No. 249, 97th Cong., 1st Sess. (1981) 28
H.R. Rep. No. 547, 93d Cong., 1st Sess. (1973) 23
H.R. Rep. No. 658, 93d Cong., 1st Sess. (1973) 25
H.R. Rep. No. 710, 93d Cong., 1st Sess. (1973) 28, 29
H.R. Rep. No. 763, 93d Cong., 2d Sess. (1974) 29
H.R. Rep. No. 805, 93d Cong., 2d Sess. (1974) 36
H.R. Rep. No. 1014, 94th Cong., 2d Sess. (1976) 37
H.R. Rep. No. 268, 97th Cong., 1st Sess. (1981) 28
H.R. Rep. No. 809, 97th Cong., 1st Sess., pt. 2 (1982) ... 27
S. Doc. No. 61, 93d Cong., 2d Sess. (1974), reprinted in 120 Cong. Rec. 5491 (1974) 30
H.R. Doc. No. 255, pt. I, 86th Cong., 2d Sess. (1960) 18

	Page
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p. 4487	12
p. 4599	12
84 Cong. Rec. (1939):	
p. 2307-08	13
p. 2310	13
p. 2385	13
p. 2411	13
p. 2477	13
p. 2479	13
p. 2500	13
p. 2502	13
87 Cong. Rec. (1941):	
p. 735	16
p. 1269	15
p. 1596	16
p. 6504	15
88 Cong. Rec. (1942):	
p. 781	16
p. 784	16
97 Cong. Rec. 5374-75 (1951)	18
98 Cong. Rec. 9752 (1952)	18
100 Cong. Rec. 7135 (1954)	18
101 Cong. Rec. 10459-60 (1955)	18
102 Cong. Rec. 12959 (1956)	18
111 Cong. Rec. 12639-40 (1965)	19
119 Cong. Rec. (1973):	
p. 8295-96	25
p. 21223-25	22, 24
p. 25546	26
120 Cong. Rec. 7938 (1974)	25
122 Cong. Rec. 31668 (1976)	37
124 Cong. Rec. 5012 (1978)	34
125 Cong. Rec. E5023 (daily ed. Oct. 12, 1979)	37, 38
127 Cong. Rec. (1981):	
p. H7236-7308 (daily ed. Oct. 14, 1981)	28
p. S12237-12452 (daily ed. Oct. 28, 1981)	28
128 Cong. Rec. (1982):	
p. S2572-84 (daily ed. March 23, 1982)	38
p. S2598 (daily ed. March 23, 1982)	38
p. S2713 (daily ed. March 24, 1982)	38

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In the Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF ON REARGUMENT OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

INTRODUCTION

The court of appeals, in its opinion invalidating section 244(c)(2) of the Immigration and Nationality Act, held that "the essence of the violation here was the violation of the separation of powers rule" (J.S. 55a). It premised its decision on a view that section 244 establishes a "program of individual adjudicative-type determinations" (J.S. 46a), and it acknowledged that "the practicality of alter-

natives to legislative disapproval in other situations raises difficult questions . . . [which] might present considerations different from those we find here . . . as to the question of separation of powers. . . ." (J.S. 55a) (footnotes omitted).

Since the filing of the opening briefs in this case, the United States Court of Appeals for the District of Columbia Circuit has decided two other challenges to provisions for legislative review.[1] In contrast to the narrow separation of powers holding of the Ninth Circuit, the District of Columbia Circuit has premised its decisions on the view that legislative review statutes violate "Article I, Section 7, . . . by preventing the President from exercising his veto power. . . ." (App. 37a, No. 81-2008). This sweeping view of the Presentation Clause aims indiscriminately at all legislative review provisions. Accordingly, the Court now has before it two approaches to judicial consideration of legislative review which differ markedly in their potential to disrupt the numerous accommodations between the political branches which legislative review has made possible.

This Court should not accept respondents' request that it dismantle in a single stroke an entire system of balancing the extraordinary powers which are part of contemporary governance. It should instead adhere to the sound tradition that it will "not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' "*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concur-

[1] *Consumers Union of U.S., Inc.* v. *Federal Trade Commission*, No. 82-1737 (D.C. Cir. decided Oct. 22, 1982) (en banc), *notices of appeal filed*, (D.C. Cir. Nov. 4, 1982); *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), *appeals and petitions for certiorari filed*, 50 U.S.L.W. 3896 (U.S. April 29, 1982) (No. 81-2008, etc.). *See also* note 72 *infra*. The decision in *Consumers Union* was rendered under a special jurisdictional statute providing that it "shall be reviewable by appeal directly to the Supreme Court of the United States." 15 U.S.C. 57a-1(f)(2) (Supp. IV 1980).

ring). To amplify the reason why this Court should not depart from its settled principles of restraint in constitutional adjudication, we have requested leave to file this supplemental brief to present historical facts relating to the purpose of the Presentation Clause and to the development of legislative review over the past fifty years.

In Part I, we describe the intent of the Framers in adopting the second part of the Presentation Clause, Article I, Section 7, Clause 3, which requires that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . [as] in the Case of a Bill." The Framers' concerns in adopting the Presentation Clause did not extend to foreseeing or forestalling legislative review, but concerned only the methods of enactment of legislation. Thus, in evaluating respondents' sweeping approach, their abstract argument based on the Framers' intent is not sufficient.

In Part II, we address the evolution and functioning of legislative review. The evolution of legislative review shows that it has not served as a means for enactment of new legislation, the concern underlying the Presentation Clause. Rather, it has allowed Congress to delegate extraordinary authority sought by the President and agencies to respond to problems of the Depression, World War II, and the 1970's, while providing a mechanism for assuring democratic accountability for the exercise of that broad authority. When these checks and balances on the exercise of extraordinary governmental power are examined in particular statutes and cases, they will be seen to serve rather than to evade the objectives of separation of powers.

ARGUMENT

I.

IN ADOPTING THE PRESENTATION CLAUSE, THE FRAMERS WERE CONCERNED ONLY WITH THE METHODS FOR ENACTING NEW LEGISLATION, NOT WITH LEGISLATIVE REVIEW PURSUANT TO PREVIOUSLY ENACTED LAW

Much of what respondents say in their sweeping Presentation Clause challenge to all legislative review provisions is accurate but not relevant to the issue in this case. Respondents rely primarily on the Presentation Clause [2] to argue that Congress cannot enact new legislation unless both Houses adopt it and present it to the President for signature or veto. That is not disputed. In using legislative review, however, Congress does not attempt or purport to enact legislation. Legislative review under statutes as diverse as those dealing with war powers, impoundments, national emergencies, and cancellation of deportations shares one fundamental character: the resolutions of disapproval which these statutes authorize the Congress to adopt are not original legislation. Rather, in each instance, Congress acts pursuant to previously enacted legislation, and exercises only the authority provided in that legislation; it does not alter, amend, or change the law.

Respondents suggest that the "very possibility" of legislative review "was for[e]seen and foreclosed by the Framers," INS Brief at 24, when they adopted the Presentation Clause. To support this, respondents quote James Madison's comment during the Constitutional Convention when he made the proposal which led to the adoption of that clause. *Id.* That isolated quote, however, is proffered with no accompanying historical explanation to suggest how it is applicable to legislative review.

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[2] Respondents also rely on other provisions of Article I and the bicameralism principle. All the provisions relied on by respondents concern the same matter: how new legislation is enacted.

In fact, the historical background of the Presentation Clause makes the Framers' actual concerns explicit: the Framers desired to limit the methods for enactment of legislation. This goal arose from their familiarity with different types of legislation, and specifically with the experience under the Pennsylvania Constitution of 1776 with different methods for enacting different types of legislation.[3] The Pennsylvania Constitution prescribed procedural requirements intended to improve legislation: all "bills of [a] public nature" had to be printed after being introduced, and had to lie over until the following session of the legislature before adoption.[4] These printing and layover requirements only applied to "bills." At the time, legislation could also be enacted as a "resolve," which was a form of legislation distinct from the bill.[5] By apply-

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[3] *See* R. Luce, *Legislative Procedure* 555 (1922) (comparing Pennsylvania system and Presentation Clause and concluding that "[d]oubtless this [Pennsylvania system] was in mind when the Federal Constitution was made to read" as the Presentation Clause does).

[4] Pa. Const. Section 15 (1776) provided:

> SECT. 15. To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.

[5] *See* L. S. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* § 752, at 297 (1856) ("A resolve * * * is the form generally adopted in this country, when adminstrative, local, or temporary laws are to be passed.") The Pennsylvania Constitution alluded to the resolve as the form of emergency legislation in requiring the president and council of the state to "expedite the execution of such measures as may be resolved upon by the general assembly; * * * " Pa. Const. Section 20 (1776).

A contemporaneous report described the power of the Pennsylvania assembly of "proceeding by resolve in all cases" as follows:

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ing the printing and layover requirements to bills without mentioning resolves, the Pennsylvania Constitution apparently intended to allow "urgent temporary legislation"[6] to be adopted as a resolve without such requirements.

Using this method, the Pennsylvania legislature routinely evaded printing and layover requirements through adoption of resolves. "[T]o propose legislation at one session and enact it at the next was found so troublesome that in practice nearly all bills were treated as temporary, and at the ensuing session were declared permanent." [7] A 1784 report of a committee of the Council of Censors, a state body responsible for periodically reviewing the state government's adherence to its constitution, charged that the procedures for enacting legislation had

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> The power however to proceed in that manner seems to have been, clearly, in the view of the convention, as it is, by the 20th section of the constitution, made the express duty of the Executive Council to forward the execution of their resolves. The words are, and they are remarkable, "they are to take care that the laws be duly executed; they are to expedite the execution of such measures, as may be resolved upon by the General Assembly." *There is, in the same sentence, a plain distinction taken betwixt laws and resolves*—indeed, they are contradistinguished. The Executive Council are to execute the laws.—They are to expedite the execution of measures resolved upon by the Assembly.—The power of proceeding by resolve is then clearly acknowledged.

Journal of the Second Session of the Council of Censors (August 30, 1784) (emphasis supplied) (minority report of a committee whose role is discussed below on this page). Other contemporary state constitutions also referred to resolves. *See* Va. Const. (1776) ("no reprieve or pardon shall be granted, but by resolve of the House of Delegates"); Delaware Const. Art. 7 (1776) (same); N.C. Const. Art. XLV (1776) ("any member of either House of General Assembly shall have liberty to dissent from, and protest against any act or resolve"). State constitutions similarly distinguished between "bills" and "ordinances." *See* Ga. Const. Arts. XXVII, XXVIII (1777); S.C. Const. Art. VII (1776).

[6] A. Nevins, *The American States During and After the Revolution* 152 (1969).

[7] A. Nevins, *supra* note 6, at 152.

been evaded through the adoption of resolves instead of bills, by the following mechanism:

> [T]he exercise of a power, assumed by the General Assembly to make laws and to alter laws, and to appropriate the lands, goods and money of the commonwealth by RESOLVE only, which so far from being published for consideration, and deferred to the next session, is passed secretly and immediately.[8]

Three years after the committee published its report, the federal Constitutional Convention assembled. On August 15, 1787, during the debate on the President's veto, a delegate from Pennsylvania, Gouverneur Morris, reminded the Convention of the dangers pointed out by the "report of the council of censors in Pennsylvania." [9] After the Convention finished debating the size of the Congressional vote required to overrule a veto, Madison made the motion that led to the Presentation Clause. Madison's subsequent writings in *The Federalist* show that he knew of the Council of Censors report,[10] and that Madison agreed with the report's finding that through adoption of resolves instead of bills, "the precautions chiefly relied on by the [Pennsylvania] constitution against improper acts of the legislature" had been evaded.[11]

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[8] *A Report of the Committee of the Council of Censors. . . .* 13 (1784) (original in italics). In the committee's report, "a multitude of violations of the section which demanded that all bills not introduced under stress of an emergency should be held over for vote by the following Assembly, and meanwhile be printed for public consideration, were alleged." A. Nevins, *supra* note 6, at 190.

[9] 5 J. Elliott, *Debates on the Adoption of the Federal Constitution* 430 (1974 ed.).

[10] *See* J. Madison, *The Federalist* No. 50, at 353 (Wright ed. 1974). This Court has recognized the relevance of the Council of Censors report in interpreting the Constitution. *See Powell* v. *McCormack*, 395 U.S. 486, 529–30 (1969).

[11] J. Madison, *The Federalist* No. 48, at 346 (Wright ed. 1974). Madison explained:

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Therefore, Madison offered his proposal which prevented the problem, decried by the Council of Censors, of enacting resolves without following the procedure for enacting other legislation:

> Mr. MADISON, observing that if the negative of the President was confined to *bills,* it would be evaded by acts under the form and name of resolutions, votes, &c., proposed that "or resolve" should be added after *"bill"* in the beginning of section 13, with an exception as to votes of adjournment, &c.[12]

At first, Madison's proposal to make resolves part of the regular enactment process was rejected. The following day his proposal was redrafted as the Presentation Clause and accepted.[13]

Madison's offer of the proposal which became the Presentation Clause reflected the specific concern of the Framers that there be only one method for the enactment of legislation. There is no evidence that the Framers' concerns in adopting the Clause went beyond enactment of legislation, or that the Framers sought to forestall, or even foresaw, legislative review disapproval resolutions, all of which draw their authority from acts passed in compliance with the Presentation Clause.

Moreover, the Congress has been faithful to the requirement that legislation in the form of resolutions be presented to the President. The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), was a joint resolution of the Congress which had been presented to the President and vetoed by him. It became law only after it was repassed by two-thirds of each House as required by

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> A great number of laws had been passed [in Pennsylvania], violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of the legislature.

Id.

[12] 5 J. Elliott, *supra* note 9, at 431 (emphasis in original).

[13] *Id.* (referring to redrafting by E. Randolph).

Article I, Section 7, Clause 3. 87 Stat. 559-60 (1973). Pursuant to the War Powers Resolution, the Congress may by concurrent resolution direct the President to remove the armed forces of the United States from foreign hostilities to which they have been committed in the absence of a declaration of war or specific statutory authorization. Section 5(c) of the War Powers Resolution, 50 U.S.C. 1544(c); see pages 21-24 *infra* (legislative history of provision). While the form of the congressional action is a concurrent resolution, the legal obligation of the President to comply with the action of the Congress is created by the joint resolution, which has been enacted into law in accordance with the Presentation Clause. The Presentation Clause demands no more.

II.

THE EVOLUTION OF LEGISLATIVE REVIEW SHOWS THAT ITS FUNCTION HAS BEEN TO PRESERVE THE BALANCE OF THE ELECTED BRANCHES

The evolution of legislative review over the past five decades shows that its most important function has been to avoid or restrain broad delegations of authority to the President or agencies; it has not served to enact legislation outside the constitutional process. In delegating authority to the President or an agency, Congress faces a fundamental dilemma. Delegation of broad authority runs counter to the basic democratic tenets of our system of government. The nondelegation doctrine sums up those basic tenets: broad delegations of power must be controlled so "that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). When Congress delegates broad powers over reorganization, war, budgets, energy or regulation, the electorate can no longer hold Congress responsible for the exercise of those powers, and it thereby risks unaccountable national policymaking. Accordingly, like this

Court,[14] Congress looks on broad delegation with disfavor.

On the other hand, as discussed below, since the 1930's Congress has faced unprecedented national problems, necessitating delegation of broad authority. The evolution of legislative review constitutes a history of those problems, because Congress and the President turned to legislative review to deal with them. Legislative review developed initially in response to the problems of reorganizing the sprawling government structure created in response to the Depression. Such review received its most thorough constitutional consideration by Congress at that time. Subsequently, legislative review was used to respond to the problems of waging World War II, and of postwar national security. Similarly, in the 1970's Congress used legislative review to respond to broad Presidential claims of war, impoundment, and national emergency powers, and to deal with the energy crisis. Finally, Congress has experimented with legislative review to solve the problem of broad delegations of rulemaking authority.

Our analysis of the history of legislative review proceeds through each of the five main historical contexts of such review, looking at three aspects of that history. First, it examines the function of legislative review as the counterpoint to broad authority sought or claimed by the President. Second, it examines the Executive's position, to determine whether legislative review has resulted from accommodation by the elective branches to practical prob-

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[14] *See Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion) (noting danger of statutory construction that delegates sweeping authority); *id.* at 685-87 & nn. 6-7 (Rehnquist, J., concurring) (citing commentary on nondelegation doctrine); *American Textile Manufacturers Institute* v. *Donovan, Inc.*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

lems.[15] Third, it examines consideration in Congress of constitutional issues.[16]

A. REORGANIZATION ACT

When Congress enacted and the President approved the Reorganization Act of 1939, they established the chief model for legislative review provisions on the basis of extensive consideration of the delegation problem and other constitutional issues. President Hoover requested authority to reorganize the government in 1929. From the outset, President Hoover coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review.[17] Congress followed President Hoover's suggestion and authorized reorganization subject to legislative review; this authority, as amended, lapsed in 1935.[18] In 1936, President Roosevelt created a

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[15] *Compare United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473 (1915) (discussing importance of the history of a practice and acquiescence in it in judging constitutionality), *and Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 (1977) (reviewing statutory precedent for challenged provision), *with Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 611-13 (1952) (Frankfurter, J., concurring) (describing lack of precedent for challenged action).

[16] *See, e.g., Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (importance of prior Congressional consideration of constitutional issue).

[17] He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Pub. Papers 432 (1929).

[18] The initial authority was provided in an appropriation act. Act of June 30, 1932, ch. 314, Section 407, 47 Stat. 382, 414. In 1933, the Attorney General issued an opinion on another statute which stated that the legislative review provision for reorganizations was unconstitutional. 37 Op. Att'y Gen. 56 (1933), *cited in* INS Brief at 58 n. 37. Subsequently the Department of Justice disavowed the opinion. See note 38 *infra*.

In 1933, Congress revised the reorganization authority and provided for it to expire in 1935, this time without legislative review. *See* Fisher & Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, in Subcomm. on Rules of the House, 96th Cong., 2d Sess., *Studies on the Legislative Veto* 174-82 (Comm. Print 1980).

Committee on Administrative Management to study the problems created by the superimposition of newly formed agencies on the pre-existing government structure. That committee concluded that there was "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers." [19]

To deal with this problem, the Administration requested revival of reorganization authority without legislative review, [20] posing an acute problem of broad delegation. Reorganization authority involved major policy decisions about what agencies should exist and which powers should be coordinated or separated. Congressional opponents attacked the proposed reorganization bill as an unconstitutional delegation of legislative authority to the President which would afford him virtually dictatorial power. [21] Concerns regarding the breadth of delegation were reflected when this Court heard challenges to the prior reorganization authority. [22]

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[19] *Report of the President's Committee on Administrative Management* (1937), *reprinted in* S. Doc. No. 8, 75th Cong., 1st Sess. 67 (1937) (referring to independent regulatory commissions).

[20] In 1937 the committee's draft bill to renew the President's reorganization authority was introduced in the Senate. Fisher & Moe, *supra* note 18, at 186. For descriptions of the legislative development of the Reorganization Act, see D.G. Morgan, *Congress and the Constitution: A Study of Responsibility* 184-200 (1966); R. Polenberg, *Reorganizing Roosevelt's Government: The Controversy Over Executive Reorganization, 1936-1939* 125-87 (1966).

[21] *See, e.g.*, 83 Cong. Rec. 4599 (1938) (Rep. Lord). Charges concerning "dictatorship" were so frequent that President Roosevelt prepared a letter which was reprinted in the Congressional Record:

> My Dear ———: Many thanks for your letter telling me that you are concerned over the charges in several newspapers that the reorganization bill now before the Congress would make me a dictator.
>
> (1) As you well know I am as much opposed to American dictatorship as you are. . . .

83 Cong. Rec. 4487 (1938).

[22] In two cases the Court avoided ruling on challenges "that Congress was without constitutional power to delegate to the President au-

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In 1938, after extensive debate on the breadth of the delegation, the House rejected President Roosevelt's request for reorganization authority. The President then dropped his initial resistance to legislative review.[23] In 1939, Congress again debated the constitutional issues implicated by reorganization authority and legislative review. It attempted to apply this Court's decisions on delegation, and considered various constitutional arguments for approval or disapproval of reorganization authority by simple, concurrent, or joint resolution.[24] Ultimately, Congress found in legislative review the means to make a delegation of power to the President consistent with the responsibility of the Congress for the organization of the government.

Commentators hailed the Reorganization Act's legislative review provision as offering a practical and constitutional alternative to otherwise unduly broad delegation.[25] In the following forty-two years, reorganization authority

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thority to determine whether the transfer [of certain functions by reorganization] should be effected," *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301 (1937), on the ground that Congress had ratified the challenged reorganizations by subsequent legislation. *Id.*; *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 148 (1937).

[23] Fisher & Moe, *supra* note 18, at 189–92; Polenberg, *supra* note 20, at 185.

[24] *See, e.g.*, 84 Cong. Rec. 2307–08 (1939) (Rep. Taber) (contrasting disapproval by one House with disapproval by two Houses); *id.* at 2310 (Rep. Warren) (discussing 1933 Attorney General opinion that legislative review provision in 1932 reorganization authority was unconstitutional); *id.* at 2385 (Rep. Van Zandt) (contrasting affirmative approval by Congress with disapproval); *id.* at 2411 (Rep. Dirksen) (discussing Attorney General opinion); *id.* at 2477 (Rep. Cox) (discussing Attorney General opinion); *id.* (Rep. Taber) (reciting Presentation Clause); *id.* at 2479 (Rep. Cox) (discussing Supreme Court decision in *Currin* v. *Wallace*, 306 U.S. 1 (1939)). An amendment to substitute disapproval by either House, for disapproval by both Houses, was adopted in the House Committee of the Whole, 176–155, *id.* at 2500, but rejected by the full House, 193–209, *id.* at 2502.

[25] E. S. Corwin, *The President: Office and Powers 1787–1948* 158 (1948); Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 Pub. Admin. Rev. 176, 178 (1941).

was renewed by statute numerous times.[26] During that period the provision was used extensively. Presidents submitted 115 reorganization plans to Congress of which 23 were disapproved by Congress pursuant to legislative review provisions. See Appendix A (tabulation of disapproval resolutions). Major plans which were not disapproved and became effective included those creating the Executive Office of the President in 1939, the Department of Health, Education and Welfare in 1953, and the Office of Management and Budget in 1970.[27]

B. WORLD WAR II AND THE POSTWAR PERIOD

Shortly after adoption of the Reorganization Act of 1939, Congress and the President applied the legislative review procedure devised in it to resolve the delegation problem for national security.[28] In 1941, President Roosevelt asked Congress to authorize lending or leasing of war materials to foreign governments, and to extend indefi-

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[26] Reorganization Act of 1949, Pub. L. No. 81-109, Section 6, 63 Stat. 203, 205; Pub. L. No. 83-3, 67 Stat. 4 (1953); Pub. L. No. 85-286, 71 Stat. 611 (1957); Pub. L. No. 87-18, 75 Stat. 41 (1961); Pub. L. No. 88-351, 78 Stat. 240 (1964); Pub. L. No. 89-43, 79 Stat. 135 (1965); Pub. L. No. 89-554, Section 906, 80 Stat. 378, 396 (1966); Pub. L. No. 91-5, 83 Stat. 6 (1969); Pub. L. No. 92-179, 85 Stat. 574 (1971); Pub. L. No. 95-17, Section 906, 91 Stat. 29, 32 (1977); Pub. L. No. 96-230, 94 Stat. 329 (1980). After 1949, reorganization statutes provided for disapproval of reorganization plans by one House. The Congress has under consideration President Reagan's request for the renewal of reorganization authority. *See Reorganization Act of 1981: Hearing Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. on S. 893 at 2-3, 6-7 (1981).

[27] Reorg. Plan No. 1 of 1939, *reprinted in* 53 Stat. 1423 (Executive Office); Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631 (HEW); Reorg. Plan No. 2 of 1970, *reprinted in* 84 Stat. 2085 (OMB).

[28] "The world turmoil that led to World War II occasioned the need to transfer greater authority to the president in the areas of foreign affairs and national security. The legislative veto was included in statutes conferring additional authority to constrain presidential initiative." B.H. Craig, The Legislative Veto: Its Implications for Administration and the Democratic Process 58 (unpublished University of Connecticut Ph.D. dissertation 1982).

nitely the period of compulsory military service to prepare for the possibility of war.[29] Both of these steps involved the delegation of broad authority, and Members of Congress charged that the delegation sought was excessive.[30] To resolve this problem, Congress enacted both measures with legislative review provisions that allowed Congress to terminate the delegated authority by concurrent resolution.[31]

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[29] An Act to Promote the Defense of the United States, ch. 11, 55 Stat. 32 (1941); Service Extension Act of 1941, ch. 362, 55 Stat. 626. An earlier statute, the Neutrality Act of 1939, ch. 2, 54 Stat. 4, had authorized either the President, or Congress by concurrent resolution, to embargo exports to belligerents.

[30] The Lend-Lease Act was criticized on the ground that the President wanted "and we yield power in his own discretion, on his own terms, and as he may see fit, to conduct undeclared war anywhere in the world." 87 Cong. Rec. 1269 (1941) (Sen. Clark). The authority to extend the military service period was criticized on the ground that "there is no language limiting the maximum time of service. It is then a question—and I think a serious one—as to whether the President, while his authority exists, may not extend the period of service absolutely indefinitely. . . ." 87 Cong. Rec. 6504 (1941) (Sen. White).

[31] Section 3(c) of an Act to Promote the Defense of the United States, 55 Stat. 32 (1941); Section 2 of the Service Extension Act of 1941, 55 Stat. 626.

In 1953, Justice Jackson published a memorandum signed by President Roosevelt which stated the President's belief that the termination provision of the Lend-Lease act was unconstitutional. At the time President Roosevelt wrote the memorandum, Justice Jackson was serving as Attorney General and the President committed the private memorandum to his care without communicating his views to the Congress. Justice Jackson wrote:

> But was it unconstitutional? That was a different question, which we discussed over and over. The question on which my doubts were not fully satisfied never bothered the President in the least. It seemed to me to depend on whether the provision was to be considered as a reservation or limitation by which the granted power would expire or terminate on the contingency of a concurrent resolution or was to be regarded as authorizing a repeal by concurrent resolution.

Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1355 (1953).

After the United States entered World War II, Congress enacted over thirty statutes conferring powers on the Executive with similar legislative review provisions.[32] The Administration submitted draft bills containing such provisions and affirmed their constitutionality in a legal memorandum.[33] Congressional critics charged that the provisions violated the Presentation Clause.[34] Both the critics who challenged such provisions, and the Administration, which defended them, agreed that their precedent was in the Reorganization Act; debate focused on the critics' attempts to distinguish these provisions from the Reorganization Act on narrow grounds.[35]

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[32] *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1089–90 (1975) (listing statutes). A contemporary political scientist explained the crucial role of legislative review provisions in the debates of this period:

> Termination by concurrent resolution is more likely to be provided in measures whose passage on a preliminary survey, appears doubtful. Without this provision, the Service Extension Act of 1941 would probably not have received even the 203 to 202 vote by which it passed the House.

White, *Executive Responsibility to Congress Via Concurrent Resolution*, 36 Am. Poli. Sci. Rev. 895, 898 (1942) (footnotes omitted).

[33] White, *supra* note 32, 36 Am. Poli. Sci. Rev. at 895 n. 2 (submission of draft bills); General Counsel to the Office of Price Administration, *Statement on Constitutionality of Concurrent Resolution Provision of Proposed Price Control Bill* (H.R. 5479) *("Statement on Constitutionality"), reprinted in Price-Control Bill: Hearings Before the House Comm. on Banking and Currency on H.R. 5479*, 77th Cong., 1st Sess. 983 (1941) *("Price Control Hearings")*. *See Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 542 n.7 (1954) (quoting provisions of wartime price control act).

[34] *See Price Control Hearings, supra* note 33, at 399, 634 (Presentation Clause quoted by Rep. Patman); 88 Cong. Rec. 781, 784 (1942) (Sen. Murdock) (same).

[35] *Compare* 87 Cong. Rec. 735 (1941) (Rep. Dirksen) (citing Reorganization Act in support of proposal to include legislative review provision in Lend-Lease Act) *with Price Control Hearings, supra* note 33, at 400, 635 (Rep. Wolcott) (distinguishing legislative review functioning under the Reorganization Act as "condition precedent" from wartime legislative review functioning as "condition subsequent") *and* 87 Cong.

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The Administration's legal memorandum justified legislative review provisions as constitutional on two principal grounds. First, it said that "[i]t has never been thought that article I, section 7, is applicable to every kind of action by the two Houses of Congress." *Statement on Constitutionality, supra* note 33, at 983. Second, it noted that the legislative review provision "is submitted to the President at the time the bill is originally passed, and he then has a chance to approve or disapprove. . . . [T]here is no constitutional requirement that the President give his approval more than once in the present situation." *Id.* at 984.

The use of legislative review before and during World War II established it as "a device that both the Congress and the Executive have repeatedly found valuable in reaching their own compromises over the form and content of delegations of authority. And that is the key point: both branches have found the legislative veto a realistic way of resolving practical issues in their relations."[36] President Roosevelt's "acquiescence in the use of concurrent resolutions during the war was continued by President Truman and his successors. . . . and has become fairly common, with only occasional presidential protest."[37]

Over the following quarter of a century after World War II, Presidents continued to accept legislative review as constitutional. After a decade of experience with legislative review, the administration of President Truman endorsed its constitutionality in 1949 with a Justice Department opinion rejecting the argument that legislative

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Rec. 1596 (1941) (Sen. Murdock) (same). The Administration rejected this attempt to distinguish the Reorganization Act. *See Statement on Constitutionality, supra* note 33, at 985.

[36] J. L. Sundquist, *The Decline and Resurgence of Congress* 356 (1981).

[37] Watson, *supra* note 32, 63 Calif. L. Rev. at 1016.

review was equivalent to enactment of new legislation.[38] The pattern set by the Truman Administration continued through the administrations of four succeeding Presidents until President Nixon vetoed the War Powers Resolution in 1973.

During the intervening years, Presidents regularly denounced provisions by which Congressional *committees* reviewed Executive activity as an unwarranted intrusion. However, respondents have not cited any instance during those administrations, and we know of none, in which any of the five Presidents formally disputed the constitutionality of legislative review provisions except for committee review provisions.[39] Rather, as the Senate Sub-

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[38] Department of Justice, *Memorandum Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in Reorganization Act of 1949*, S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949). This memorandum disapproved part of the Attorney General's 1933 opinion which had termed legislative review unconstitutional, see note 18 *supra*, as "obiter dictum" which had been "based upon an unsound premise." *Id.* at 19.

[39] The INS Brief, at 57 n.37, asserts that there is a history of presidential opposition to legislative review. It cites Watson, *supra* note 32, 63 Calif. L. Rev. at 988 n.9, who lists sixteen Presidential statements by Presidents from Truman through Nixon, and the INS Jurisdictional Statement in this case, at J.S. 22 n.19, which cites a single statement by each President from Truman through Nixon, each of which is among the sixteen cited by Watson.

Every one of these Presidential statements, until the veto by President Nixon of the War Powers Resolution, concerned bills authorizing *committee* review. President Truman: 97 Cong. Rec. 5374–75 (1951) (review by Armed Services committees); 98 Cong. Rec. 9752 (1952) (Post Office and Civil Service, and Public Works, committees). President Eisenhower: 100 Cong. Rec. 7135 (1954) (Armed Services committees); 101 Cong. Rec. 10459–60 (1955) (Appropriations committees); 102 Cong. Rec. 12959 (1956) (Armed Services committees); Pub. Papers 648–50 (1956) (Interior committees); H.R. Doc. No. 255 Pt. I, 86th Cong., 2d Sess. at M18 (1960) (Armed Services committees). President Kennedy: Pub. Papers 6 (1963) (Appropriations committees). President Johnson: Pub. Papers 861–62 (1964) (Interior committees); Pub. Papers 1249–51 (1964) (Agriculture committees); 1 Weekly Comp. Pres. Doc. 132 (1965)

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committee on Separation of Powers found in 1969, "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House, [while] disputes have continued to arise over the committee form of the veto." S. Rep. No. 549, 91st Cong., 1st Sess. (1969).[40]

In fact, Presidents Kennedy, Johnson, and Nixon actually proposed enactment of statutes with legislative review provisions in such diverse areas as withdrawal of wilderness areas, agricultural programs, taxation, federal grants, and international trade, as well as in reorganization.[41] When the constitutionality of such provisions was

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(Armed Services committees); 1 Weekly Comp. Pres. Doc. 432–33 (1965) (Public Works committees); 111 Cong. Rec. 12639–40 (1965) (Public Works committees). President Nixon: 8 Weekly Comp. Pres. Doc. 938 (1972) (Public Works committees); 8 Weekly Comp. Pres. Doc. 1076 (1972) (Public Works committees); 9 Weekly Comp. Pres. Doc. 1285–87 (1973) (War Powers Resolution).

Many of these disputes concerned a particular issue that was successfully resolved in 1972. A number of statutes provided that "no appropriation may be made" for a particular kind of public work until it had been authorized by the proper committees. Various Presidents disputed whether such provisions were part of the internal Congressional process for authorizing appropriations, or were interference with the Executive. In 1972, President Nixon concluded that they were constitutional, ending the dispute. "The Congress regards this 'no appropriation may be made' provision, I understand, as internal Congressional rule-making not affecting the executive branch, and this Administration has acquiesced in that construction." 8 Weekly Comp. Pres. Doc. 938 (1972).

[40] Even Watson, whose article challenges the constitutionality of legislative review, concedes that "[i]n marked contrast to executive acquiescence to the use of resolutions, Presidents since Roosevelt have vigorously opposed use of the committee veto." Watson, *supra* note 32, 63 Calif. L. Rev. at 1017.

[41] *See National Wilderness Preservation Act: Hearings Before the Senate Comm. on Interior and Insular Affairs on S.4,* 88th Cong., 1st Sess. (1963) (President Kennedy's proposals for legislative review of withdrawal of wilderness areas); Pub. Papers 6 (1961) (President Kennedy's proposals for legislative review of agricultural programs); *President's Message to the Congress Transmitting the Budget for Fiscal Year 1970,* 5 Weekly Comp. Pres. Doc. 70, 73 (Jan. 15, 1969) (President Johnson's proposals for legislative review of taxation); page 36 *infra* (Presi-

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questioned, the administration of President Kennedy submitted a memorandum supporting the constitutionality of legislative review.[42] During the administration of President Johnson, the Department of Justice again affirmed the constitutionality of the legislative review provision of the Reorganization Act, as contrasted with provisions for committee review.[43]

Legislative review served two chief functions in this quarter-century period. In the area of national security, legislative review provisions balanced delegations of authority in legislation addressing the Truman Doctrine, the Korean War, the Middle East Crisis of 1957, and the Vietnam War.[44] Also, in areas of novel policy initiatives, legislative review provisions balanced delegations of authority for the space program, international agreements on nuclear energy, tariff arrangements, and adjustment

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dent Nixon's proposals for legislative review of federal grants); *President's Message to the Congress Proposing Enactment of the Trade Reform Act of 1973*, 9 Weekly Comp. Pres. Doc. 343, 347 (1973) (President Nixon's proposals for legislative review of international trade agreements on non-tariff barriers).

[42] *See* General Counsel of the Department of Agriculture, *Constitutionality of Title I of H.R. 6400, 87th Cong., 1st Session* (1961), *reprinted in Legislative Policy of the Bureau of the Budget: Hearing Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 89th Cong., 2d Sess. 27 (1966).

[43] *See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 206 (1967) (testimony of Frank M. Wozencraft, Assistant Attorney General for the Office of Legal Counsel).

[44] Assistance to Greece and Turkey, Pub. L. No. 80-75, Section 6, 61 Stat. 103, 105 (1947) (Truman Doctrine); Universal Military Training and Service Act, Pub. L. No. 82-51, Section 1(j), 65 Stat. 75, 80 (1951) (conscription during Korean War); Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, Section 6, 71 Stat. 5, 6 (1957), 22 U.S.C. 1965 (Middle East Crisis of 1957); H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, Section 3, 78 Stat. 384, 385 (1964) (Tonkin Gulf Resolution), *repealed*, Pub. L. No. 91-672, Section 12, 84 Stat. 2053, 2055 (1971). *See* Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 Midwest J. Poli. Sci. 434 (1970).

of federal pay rates.[45] This last provision was challenged as unconstitutional and upheld. *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978).

C. IMPOUNDMENT, WAR, AND NATIONAL EMERGENCY POWERS

During the 1970's, the President and Congress resolved a series of major constitutional disputes over claims of the President to broad impoundment, war, and national emergency powers. Although each dispute and its resolution evolved separately, all arose from a single dilemma: the President's claim that broad powers were needed to deal with modern problems of budget control and foreign affairs, coupled with the recognition that broad powers must be checked. These confrontations tested the ability of the elective branches to adapt to modern problems within the limits of the Constitution. In seeking to reconcile broad power with accountability, the elective branches turned to legislative review, with its history of acceptance by President and Congress as a solution to similar problems.

The most serious of these constitutional disputes over the reach of the President's power concerned war powers in the wake of the conflict in Vietnam. In 1964, Congress enacted the Tonkin Gulf Resolution authorizing action in Vietnam subject to termination by concurrent resolution.[46] After the Tonkin Gulf Resolution was repealed in

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[45] National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, Section 302, 72 Stat. 426, 433 (space program); Atomic Energy Act Amendment of 1958, Pub. L. No. 85-479, Section 4, 72 Stat. 276, 277 (cooperative nuclear agreements); Trade Expansion Act of 1962, Pub. L. No. 87-794, Section 351, 76 Stat. 872, 899, 17 U.S.C. 1981 (tariff recommended by Tariff Commission may be imposed by concurrent resolution of approval); Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Section 255(i)(1), 81 Stat. 613, 644.

[46] The resolution provided that its authority "shall expire when the President shall determine that the peace and security of the area is reasonably assured . . . except that it may be terminated earlier by concurrent resolution of the Congress." Section 3 of H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, 78 Stat. 384, 385 (1964).

1970, the President claimed inherent authority to continue hostilities, and subsequently he extended military operations to Cambodia and Laos.[47]

Responding to these developments, in the early 1970's Congress deliberated extensively on legislation to govern the exercise of war powers. Congress considered carefully the constitutional issues involved in such legislation.[48] A provision of the key House bill authorized termination by concurrent resolution of use of armed forces in hostilities; its constitutionality was challenged as violating the Presentation Clause and defended as following the precedents of the Reorganization Act and the Tonkin Gulf Resolution.[49]

Subsequently, the constitutional issues were debated on the House floor, and were addressed in memoranda submitted by the House and Senate conferees on their respective chambers' bills.[50] The Constitution provides that "The Congress shall have Power . . . to declare War," Art. I, Sec. 8, cl. 11; it also provides that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." Art. II, Sec. 2, cl. 1. During the consideration of war powers legislation, Administration spokesmen had emphasized the necessity for Presidents to be able to react immediately to international emergencies by use of armed forces without awaiting a declara-

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[47] See House Comm. on Foreign Affairs, 97th Cong., 1st Sess., *The War Powers Resolution* 26–30, 70–71, 106–10 (Comm. Print 1982) *("War Powers Resolution")* (describing Presidential justifications for, and Congressional reactions to, 1970 Cambodia and 1971 Laos incursions, and 1973 Cambodia bombing).

[48] For descriptions of the House and Senate hearings on war powers, see *War Powers Resolution, supra* note 47, at 55–61 (1970 House hearings), 72–77 (1971 Senate hearings), 93–95 (1971 House hearings), 119–21 (1973 House hearings), and 133–34 (1973 Senate hearings). For description of the legislative debate on war powers legislation *see id.* at 43–166.

[49] *War Powers Resolution, supra* note 47, at 123.

[50] *War Powers Resolution, supra* note 47, at 144–45. The House conferees' memorandum had been published during the House debates on passage of the House bill. See 119 Cong. Rec. 21223–25 (1973).

tion of war; they cited the history of Presidential commitments of armed forces without express legislative authority.[51] Supporters of war powers legislation sought means to implement the constitutional responsibility for the Congress to "declare War" before the nation committed itself to prolonged combat, while not precluding emergency Presidential commitments of armed forces in appropriate circumstances. They focused on two mechanisms for insuring legislative decisions after an emergency commitment: an automatic end to such a commitment after a fixed period of time absent express legislative authorization to continue, and a provision for termination by concurrent resolution.[52]

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[51] *War Powers Resolution, supra* note 47, at 58, 74, 84-85, 113, 119-20; *see also id.* at 29-30, 38 (Administration positions on war powers stated prior to Congressional consideration of war powers legislation).

[52] The House bill, H.R.J. Res. 542, 93d Cong., 1st Sess., relied on a limit of 120 days after which continued commitment of armed forces would require Congressional approval. It also provided for termination of commitment of armed forces at any time by concurrent resolution. The Senate bill, S. 440, 93d Cong., 1st Sess., imposed a limit of thirty days for commitment of armed forces without Congressional approval, but permitted the President unspecified additional time to remove such forces safely from hostilities. It did not provide for termination by concurrent resolution, but specified in some detail the circumstances when the President could commit armed forces. *War Powers Resolution, supra* note 47, at 142.

As a compromise, the War Powers Resolution provided a statement of the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," section 2(c), 50 U.S.C. 1541(c). However, subsequent sections of the resolution, in which provisions for limiting and terminating commitment of armed forces were set forth, were not made dependent on the authority for the initial commitment. H.R. Rep. No. 547, 93d Cong., 1st Sess. 1-2 (1973). Automatic termination of hostilities in the absence of congressional authorization was to occur after sixty days, with an additional thirty days if the President found "unavoidable military necessity respecting the safety" of the armed forces. Section 5(b), 50 U.S.C. 1544(b). The compromise was completed by a provision for termination by concurrent resolution. Section 5(c), 50 U.S.C. 1544(c).

Regarding such termination, the House conferees' memorandum relied on an opinion submitted by Professor Freund, whose "conclusion [was] that, on the substantive premises of the bill, the provision respecting a concurrent resolution is a valid and appropriate measure, and does not raise constitutional issues of the kind mooted in connection with other categories of legislation." [53] The House provision thus justified was enacted by Congress as section 5(c) of the War Powers Resolution, 50 U.S.C. 1544(c), which provides:

> Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

After the House and Senate adopted the conference version of the War Powers Resolution, President Nixon vetoed it. The President's veto message contended that two provisions were unconstitutional: the provision that "would automatically cut off certain authorities [to commit armed forces to hostilities] after sixty days," and the provision that "would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation." [54] President Nixon's veto message was the first time since adoption of the Reorganization Act of 1939 that any President had formally disputed the constitutionality of a legislative review provision other than a provision for committee review. The House and Senate passed the War Powers Resolution over the President's veto, the only time a legislative

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[53] 119 Cong. Rec. 21224-25 (1973) (reprinting letter of June 12, 1973, from Paul A. Freund to Rep. Pierre S. du Pont).

[54] 9 Weekly Comp. Pres. Doc. 1285-87 (1973).

review provision has ever been enacted over a Presidential challenge to its constitutionality.[55]

The following year, Congress resolved the problem posed by Presidential claims of inherent power to impound appropriations by a similar measure. In the early 1970's, President Nixon impounded appropriated funds totalling over eighteen billion dollars.[56] In response, Congress held hearings on legislation to govern impoundment,[57] and enacted such legislation as part of a general reform of the Congressional budget process. In 1973 and 1974, the Senate passed two bills, the first providing that impoundments could become effective only if both Houses approved, the second forbidding all impoundments.[58] The House adopted a provision allowing impoundments so long as either House could disapprove them.[59] Critics challenged the constitutionality of the House provision, while its supporters defended it as following the Reorganization Act.[60]

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[55] President Carter later took a different view of the War Powers Resolution, endorsing it as a "constructive safeguar[d]." *President's Message to the Congress on Legislative Vetoes,* Pub. Papers 1146, 1149 (1978).

[56] *See* 119 Cong. Rec. 8295-96 (1973).

[57] *Joint Hearings on Impoundment of Appropriated Funds by the President Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971).

[58] S. 373, 93d Cong., 1st Sess., adopted by the Senate, 119 Cong. Rec. 15255 (1973), allowed the President to impound appropriations for sixty days, at which point the impoundment would cease unless Congress adopted a concurrent resolution of approval. The Senate adopted H.R. 7130, 93d Cong., 2d Sess., after substituting, in place of the House language, the language of S. 1541, 93d Cong., 2d Sess., which prohibited impoundments. 120 Cong. Rec. 7938 (1974).

[59] H.R. 7130, 93d Cong., 1st Sess., adopted by the House, 119 Cong. Rec. 39740 (1973).

[60] *Compare* H.R. Rep. No. 658, 93d Cong., 1st Sess. 42 (1973) (finding "sufficient precedent" in the Reorganization Act) with *id.* at 87 (mi-

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In conference, a compromise was achieved under which permanent impoundments, termed "rescissions," would require approval through enactment of legislation. In contrast, temporary impoundments, or "deferrals," would become effective unless disapproved by one House. This compromise provided the President with flexibility, while preserving the constitutional balance. The decision to permanently rescind funds was not delegated to the President, as that would allow him to undo previously enacted decisions on appropriations, a power of "suspension" of legislation denied him by the Framers.[61] Allowing the President to defer expenditures, subject to legislative review, preserved and aided the legislative process, since it provided time for a legislative decision on whether to change previous decisions on appropriations. These provisions were enacted with the President's approval.

The Impoundment Control Act's provision for legislative review has been used extensively. Presidents have submitted hundreds of proposed budget deferrals, of which sixty-five have been disapproved by resolutions of the House or Senate with no protest by the Executive. See Appendix B (tabulating disapprovals of budget deferrals). Even critics of legislative review recognize the

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nority views) (deeming a one-House disapproval resolution to "be of doubtful legal effect"). As the floor manager of the House bill, Representative Bolling, explained, "The formula [of Presidential proposal of impoundments subject to disapproval by either House] has been used for a quarter of a century to enable the President to propose, and Congress to review, plans to reorganize Federal agencies." 119 Cong. Rec. 25546 (1973).

[61] A proposal in the Constitutional Convention "that the national executive have a power to suspend any legislative act for the term of———" was rejected, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the negative of useful laws, without answering the salutary purpose of checking unjust or unwise ones." 5 J. Elliott, *supra* note 9, at 154–55. *See Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 885–94 (1981) (discussing case law and historical underpinnings for lack of Presidential authority to suspend legislation).

soundness of the act's solution to the impoundment problem: President Carter, in his message on legislative vetoes, termed the budget act, like the War Powers Resolution, a "constructive safeguar[d]," and the House Rules Committee, which has opposed other kinds of legislative review provisions, deemed the War Powers Resolution and the impoundment control provisions "compelling examples [of] histories of essentiality." [62]

These statutes were followed by others resolving similar problems: the National Emergencies Act, resolving the longstanding problems with unchecked Executive emergency power; [63] the Arms Export Control Act, resolving the problem of foreign arms sales; [64] and the Nuclear Non-Proliferation Act of 1978, resolving the problem of exports of nuclear capability. [65] Under these provisions, major congressional deliberations over foreign policy have

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[62] *President's Message to the Congress on Legislative Vetoes,* Pub. Papers 1146, 1149 (1978); H.R. Rep. No. 809, 97th Cong., 1st Sess., pt. 2, at 18 (1982).

[63] Pub. L. No. 94-412, 90 Stat. 1255 (1976). Section 202, 50 U.S.C. 1622, provides for termination of national emergencies by concurrent resolution. *See* Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability,* 52 S. Cal. L. Rev. 1453 (1979); A. Schlesinger, *The Imperial Presidency* 306-10 (1974); note 67 *infra* (Senate hearings and reports).

International emergencies can also be terminated by concurrent resolution. Act of December 8, 1977, Pub. L. No. 95-223, Section 207(b), 91 Stat. 1625, 1628, 50 U.S.C. 1706(b) (Supp. IV 1980) (concurrent resolution under National Emergencies Act can specify termination of Presidential authority in international emergencies). This Court has recently examined the background of an international emergency in which the President used the authority delegated by this statute. *Dames & Moore, Inc.* v. *Regan,* 453 U.S. 654 (1981).

[64] Pub. L. No. 94-329, 90 Stat. 729 (1976). Section 211, 22 U.S.C. 2776(b), provides for disapprovals of sales of major defense equipment by concurrent resolution. *See* Morrison, *The Arms Export Control Act: An Evaluation of the Role of Congress in Policing Arms Sales,* 14 Stan. J. Int'l Studies 105 (1979).

[65] Pub. L. No. 95-242, Sections 303, 304(a), 306, 307, and 401, 92 Stat. 120, 130, 134, 137, 139, 144-45, 42 U.S.C. 2160(f), 2155(b), 2157(b), 2158, and 2153(d) (Supp. IV 1980), provide for disapproval of various international nuclear arrangements by concurrent resolution.

occurred, such as in consideration of President Reagan's 1981 plans to sell sophisticated aircraft to Saudi Arabia.[66]

D. ENERGY

Legislative review has served a crucial function in balancing broad delegations in legislation responding to the energy crisis of the 1970's, as shown in one of the other challenges to legislative review which is now before this Court, *United States Senate* v. *Consumer Energy Council of America, supra* note 1. The origin of this role of legislative review is explained in the legislative history of the proposed Energy Emergency Act of 1973, the progenitor of much of the energy legislation of the past nine years. In late 1973, as a result of the embargo by Arab states on shipment of oil to the United States, "the need to take emergency actions to deal with the situation [was] clearly established." H.R. Rep. No. 710, 93d Cong., 1st Sess. 24 (1973). Within a month after the embargo began, the President sought broad emergency powers from Congress to restrict public and private energy consumption, grant exemptions from environmental laws to allow more coal use, order conversion of powerplants to coal use, initiate production from naval oil reserves, and license temporarily nuclear plants without a public hearing. *Id.* at 24-25.

Congress recognized that the energy crisis raised again a problem that had recurred since "the first declared national emergency in 1933. . . . [¶] Over the course of that forty-year period, the Congress has repeatedly been presented with the problem of finding a means by which a legislative body in [a] democratic republic may extend extraordinary powers for use by the Executive during times of great crisis without imperiling our constitutional balance of liberty and authority." *Id.* at 25. Based on an investigation of the use of emergency authority since

[66] *See* H.R. Rep. No. 268, 97th Cong., 1st Sess. (1981); S. Rep. No. 249, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. H7236-7308 (daily ed. Oct. 14, 1981); *id.* at S12237-12452 (daily ed. Oct. 28, 1981).

1933,[67] Congress was reluctant to delegate unchecked emergency authority over energy use. Moreover, such a delegation would have raised the central concerns of the nondelegation doctrine, since "[t]he unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order." *Arizona* v. *California, supra* page 9, 373 U.S. at 626 (Harlan, J., dissenting in part).

Instead, first the Senate, and then both Houses, turned to legislative review as the solution. The Senate Committee on Interior and Insular Affairs explained the need for legislative review:

> Because of the broad scope of the additional authority granted the executive branch under this act, the committee believes that it is necessary for the Congress to review the manner in which that authority is to be exercised.

S. Rep. No. 498, 93d Cong., 1st Sess. 27 (1973). The conference committee adopted this approach, concluding "that the disapproval mechanism contained in this legislation provides the best opportunity for resolution of this problem." H.R. Rep. No. 763, 93d Cong., 2d Sess. 42 (1974) (conference report on the Energy Emergency Act). Both Houses enacted the conference version of the bill, delegating the Executive authority for mandatory energy conservation, rationing, and conversion of gas- and oil-burning facilities to coal use, subject to legislative review of Executive plans. The President did not object to the provi-

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[67] *See Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency,* S. Rep. No. 549, 93d Cong., 1st Sess. (1973) (Report by the Senate Special Committee on the Termination of the National Emergency); *National Emergency: Constitutional Questions Concerning Emergency Powers, Hearings Before the Senate Special Comm. on the Termination of the National Emergency,* 93d Cong., 1st Sess. (1973). In rejecting an unchecked grant of emergency power, the House Committee on Interstate and Foreign Commerce relied on the Special Committee's report. *See* H.R. Rep. No. 710, 93d Cong., 1st Sess. 25 (1973).

sions for legislative review. Indeed, in December, 1973, less than two months after President Nixon vetoed the War Powers Resolution, the Administration apparently supported a proposal for delegation of broad energy powers subject to legislative review.[68] When emergency legislation emerged from conference, President Nixon vetoed it in March, 1974, based on criticism of its substantive authority, without opposing legislative review provisions.[69]

Subsequently, most of the authority proposed in the bill was enacted or reenacted in other energy legislation with legislative review provisions. Legislative review became the critical component for balancing a host of broad statutory delegations concerning energy rationing, contingency plans strategic oil reserves, allocation of energy production materials, oil exports, and naval reserve production.[70] While President Carter opposed some legislative review provisions, he accepted others. For example, the House of Representatives passed legislation to authorize

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[68] President Nixon "sought authority to institute emergency plans immediately, subject only to a congressional veto within 15 days. . . ." *Excess Profits Provision Delays Emergency Energy Bill,* 31 Cong. Q. Weekly Rev. 3335 (1973). The Senate Committee on Interior and Insular Affairs reported out such authority, S. 2589, 93d Cong., 1st Sess. (as reported), based on extensive consultations in closed hearings with administrative representatives. S. Rep. No. 498, 93d Cong., 1st Sess. 15 (1973).

[69] S. Doc. No. 61, 93d Cong., 2d Sess. (1974) (veto message), *reprinted in* 120 Cong. Rec. 5491 (1974).

[70] Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, Section 201, 90 Stat. 303, 309, 10 U.S.C. 7422(c)(2)(C) (naval reserve production); Energy Policy and Conservation Act, Pub. L. No. 94-163, Sections 159, 201, 401(a), and 455, 89 Stat. 871, 886, 890, 941, and 950 (1975), 42 U.S.C. 6239 and 6261, 15 U.S.C. 757 and 760a (strategic oil reserves, rationing and contingency plans, oil price controls and product allocation); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, Section 12, 88 Stat. 1878, 1892-93, 42 U.S.C. 5911 (allocation of energy production materials); Act of November 16, 1973, Pub. L. No. 93-153, Section 10, 87 Stat. 576, 582, 30 U.S.C. 185(u) (oil exports).

adoption of standby gasoline rationing plans subject to legislative review, with President Carter's approval:[71]

> I don't object to the one House veto if it's done expeditiously. . . . [¶] I have no objection to [a provision for] the House, within 2 weeks [after submission of a rationing plan], either approving the plan that I have tried to put into being or if either House wants to veto it, they can do that.

One of the energy acts, the Natural Gas Policy Act of 1978 ("NGPA"), is challenged in a legislative review case recently docketed in this Court. See note 72 *infra*. Congress enacted the NGPA after eighteen months of strenuous effort to solve the enormously divisive and controversial issues raised by President Carter's energy proposals. As part of gradual natural gas price deregulation, Title II of the NGPA establishes a program for "incremental pricing" of natural gas, under which some industrial users of natural gas pay a disproportionate share of price increases for tapping new sources of gas.

Congress was willing to mandate in 1978 that such incremental price increases be paid by low-priority "boiler fuel" users of natural gas. However, it was reluctant to extend such pricing to high-priority industrial gas users, with their important role in the national economy. As a court of appeals has noted, "[t]he incremental pricing scheme Congress adopted in the NGPA was novel and experimental, and viewed with some trepidation by many members who feared it would bring in its wake massive switching to non-gas fuels, regional dislocations of industry, and a bureaucratic orgy." *Ohio Association of Community Action Agencies* v. *Federal Energy Regulatory Commission*, 654 F.2d 811, 820 (D.C. Cir.1981).

Accordingly, Congress established a procedure for gaining experience with incremental pricing before it was fully implemented. It balanced the delegation of authori-

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[71] *President's News Conference of July 25, 1979*, 15 Weekly Comp. Pres. Doc. 1303, 1311 (1979). The statute referred to was enacted as the Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, Section 103, 93 Stat. 749, 753, 42 U.S.C. 6421(c) (Supp. IV 1980).

ty to devise incremental pricing regulations for high-priority industrial users with a provision for legislative review, in light of the regulations' potential for drastically affecting the burden of natural gas pricing.[72] Pursuant to that provision for legislative review, in 1980 the House of Representatives disapproved incremental pricing regulations. Consumer groups challenged the legislative review provision, and a panel of the court of appeals declared the statute unconstitutional, both on separation of powers grounds and on a sweeping view of the Presentation Clause. *Consumer Energy Council of America* v. *FERC, supra* note 1.

E. RULEMAKING

In recent years, Congress has experimented with use of legislative review as a check on broad delegations of rulemaking authority, as shown by the second recent challenge to legislative review which has been appealed to this Court, *Consumers Union of U.S., Inc.* v. *Federal Trade Commission, supra* note 1. Since the power to make rules is, in effect, a delegation of the power to legislate, broad delegations to agencies of such power raise the fundamental concerns underlying the nondelegation doctrine. As delegations of rulemaking authority to independent regulatory commissions, and to Executive Branch agencies, have become broader, they have been criticized for "threaten[ing] the legitimacy of agency action," [73] leading to "a strong and persisting challenge

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[72] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, Section 202(c), 92 Stat. 3350, 3372, 15 U.S.C. 3342(c) (Supp. IV 1980). The statutory scheme is further described in *Petition of United States Senate for a Writ of Certiorari, United States Senate v. Consumer Energy Council of America, et al., petition for certiorari filed,* 51 U.S.L.W. 3099 (U.S. August 2, 1982) (No. 82-177). *See also* note 1 *supra.*

[73] Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1669, 1676 (1975). For other discussions of the contemporary delegation problem, *see* Cutler & Johnson, *Regulation and the Political Process,* 84 Yale L.J. 1395 (1975); McGowan, *Congress, Court, and Control of Delegated Power,* 77 Colum. L. Rev. 1119 (1977); Wright, *Beyond Discretionary Justice,* 81 Yale L.J. 575 (1972).

to the basic legitimacy of the administrative process itself." [74]

This Court has expressed serious concern with broad rulemaking delegations. *See Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, supra* note 14. However, there are circumstances when it is impractical or undesirable for Congress to enact narrowly drafted solutions which anticipate all aspects of a national problem.[75] Rulemaking by independent regulatory commissions presents Congress with a special aspect of this problem, because the independent regulatory commissions are not democratically accountable through Presidential responsibility.[76]

In 1975, Congress expressly delegated to the Federal Trade Commission (FTC) broad authority to make rules to prevent businesses from engaging in "unfair or deceptive acts or practices in commerce." [77] After several years' ex-

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[74] J.O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 10 (1978).

[75] Narrowly specific delegations

> would be neither feasible nor desirable in many cases. . . . [¶] In many government endeavors it may be impossible in the nature of the subject matter to specify with particularity the course to be followed. . . . [¶] In addition, there appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail.

Stewart, *supra* note 73, 88 Harv. L. Rev. at 1695 (footnotes omitted).

[76] The President does not control independent agency rulemaking because independent agencies are not part of the Executive Branch and their commissioners are not subject to executive removal. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Accordingly, Executive review of rulemaking has exempted independent agency rulemaking from control. Section 1(d) of Executive Order 12291, 46 Fed. Reg. 13193 (1981) (rulemaking review by the Office of Management and Budget excludes independent agencies), *citing* 44 U.S.C. 3052(10).

[77] In 1973, a court of appeals ruled that the FTC's authority under its 1914 charter allowed it to make substantive rules. *National Petroleum Refiners Assn.* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). In 1975, Congress expressly delegated such authority in the Federal Trade Commission Improvement Act. Pub. L. No.

Continued

perience with FTC rulemaking, Members of Congress found that under the FTC's

> very broad authorities to prohibit conduct which is 'unfair or deceptive' the FTC can regulate virtually every aspect of America's commercial life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review.

124 Cong. Rec. 5012 (1978) (statement by Representative Broyhill). Legislative review was proposed to constrain that broad delegation.

Congress gave extensive consideration to the constitutionality of legislative review for FTC rulemaking, examining, most importantly, the Attorney General's 1977 opinion reaffirming the constitutionality of the legislative review provision in the Reorganization Act.[78] After three years of hearings and debate, in 1980 Congress enacted a legislative review provision in its reauthorization of the FTC.[79] In 1982 Congress adopted a concurrent resolution disapproving FTC rules concerning the used car industry. The constitutionality of the legislative review provision was challenged and in October, 1982, the court of appeals

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93-367, Section 202(a), 88 Stat. 2183, 2193 (1975), 15 U.S.C. 57a (Supp. IV 1980) (as amended).

[78] The Attorney General concluded that "[T]he statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress. . . . [¶] The procedures prescribed in Article I, § 7, for congressional action are not exclusive." 43 Op. Att'y Gen., Op. No. 10, at 2-3 (1977). The Deputy Assistant Attorney General for the Office of Legal Counsel was questioned about the Attorney General's opinion during hearings on the FTC provision, and agreed that the opinion "was antedated by statements made by the heads of my office, starting at least as far back as now Justice Rehnquist, and I think going back a number of years beyond that to then Attorney General Clark in 1949." *Oversight of the Federal Trade Commission: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 236 (1979).

[79] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, Section 21(a), 94 Stat. 374, 393, 15 U.S.C. 57a-1 (Supp. IV 1980).

declared it unconstitutional in a brief per curiam opinion, based on the court's previous invalidation of the natural gas incremental pricing provision. *Consumers Union of U.S., Inc.* v. *FTC, supra* note 1.

Legislative review for independent agency rulemaking has been before this court once before. In 1976, the legislative review provision for rulemaking by an independent commission, the Federal Election Commission, was challenged. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). While the majority opinion did not reach that constitutional challenge, *id.,* 424 U.S. at 140 n.176, Justice White's concurring opinion concluded that legislative review was constitutional, because Congress was not making rules, but only disapproving them.[80] "[I]n the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure. . . ." *Id.* at 285–86 (White, J., concurring in part and dissenting in part). Since then, this Court has reviewed Federal Election Commission rules which had been previously reviewed by Congress, and has found the prior legislative review to be an aid in construing the statute. *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 34 (1981).

Besides applying legislative review to rulemaking by independent agencies, Congress has also experimented with legislative review for certain executive agencies. The constitutional dispute over such provisions began with one for education regulations. During the 1960's, Congress enacted a number of narrow grant programs to be administered by the Commissioner of Education. In 1969, President Nixon sought discretion to consolidate fragmented

[80] "Disapproval nullifies the suggested regulation and prevents the occurrence of any change in the law. The regulation is void. . . . It would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses." 424 U.S. at 285 n.30 and 286 (White, J., concurring in part and dissenting in part).

grant programs, while checking the discretion thereby delegated through legislative review:

> The legislation I propose would be patterned in part after procedures used successfully for the past 20 years to reorganize Executive Branch functions. It would give the President power to initiate consolidation of closely related Federal assistance programs, and to place consolidated programs under the jurisdiction of a single agency. However, it would give either House of Congress the right to veto a proposed consolidation within 60 days, and it would establish stringent safeguards against possible abuse.[81]

Congress found subsequently that fragmented and narrow education grant programs "inevitably lead to Executive-Legislative confrontations" because they inappropriately limit the Commissioner of Education's authority: "a Commissioner unwilling to tolerate the delay inherent in proposing new legislation is tempted to 'bend' existing program requirements and to combine different program authorities to secure the base of funding necessary to implement his ideas." S. Rep. No. 763, 93d Cong., 2d Sess. 69 (1974). To solve this problem, in 1974 Congress "elim'nate[d] the [grant] categories that now limit[ed] the Commission[er]'s discretion. In their place it substitute[d] a broad authority with minimal strings attached." *Id.*

However, as President Nixon's suggestion of legislative review had reflected, ending the narrow grant categories conferred great discretion. Congress recognized that prior discretion had led to "steady escalation of agency quasi-legislative power, and the corresponding attrition in the ability of the Congress to make the law. For at least four decades now, the agencies of the Executive Branch have increasingly used their rule-making authority to 'correct' what they feel are the errors and ambiguities of the law." H.R. Rep. No. 805, 93d Cong., 2d Sess. 73 (1974). Accord-

[81] *President's Message to the Congress Proposing Legislation for Improving Administration of Grant-in-Aid Programs*, 5 Weekly Comp. Pres. Doc. 635 (1969).

ingly, the statute which consolidated the grants subjected rulemaking by the Commissioner of Education to legislative review.[82]

President Ford signed the bill into law on August 21, 1974, "[a]s the first major legislation to become law during my Administration. . . ." [83] He praised Congress for consolidating narrow categorical grant programs, *id.*, but protested that the review provision constituted an attempt by Congress "to administer Federal programs" which was "questionable on practical as well as constitutional grounds." *Id.* at 37. Together with President Nixon's veto of the War Powers Resolution, President Ford's protest inaugurated the period of the last nine years during which the Executive Branch has formally disputed most, but not all provisions for legislative review.

Recent Congresses have considered proposals to make legislative review provisions applicable to rulemaking by all federal agencies.[84] In the 95th and 96th Congresses, regulatory reform bills received extensive consideration, but neither House voted on such bills.[85] In the current

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[82] Title IV of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 535, consolidated a series of grant programs. Section 509 of the act, now codified at 20 U.S.C. 1232(d)(1) provided that rules for the general education program could be disapproved by concurrent resolution. As in the case of Federal Election Commission regulations, see page 35 *supra*, this Court has reviewed education regulations which have been previously reviewed by Congress under this provision, and has found the prior legislative review to be an aid in construing the statute. *See North Haven Bd. of Education* v. *Bell*, 102 S.Ct. 1912, 1923-24 (1982).

[83] Pub. Papers 35, 37 (1974).

[84] H.R. 12048, 94th Cong., 2d Sess., was voted on under a motion for suspension of the rules, which requires a two-thirds vote to pass. It was rejected on a vote of 265-135, two votes short of the necessary two-thirds. *See* H.R. Rep. No. 1014, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 31668 (1976).

[85] *See* S. Rep. No. 1018, 96th Cong., 2d Sess., pt. 2, at 12-17 (1980). In the House, hearings were held in the 96th Congress on generic legislative review legislation, but no bill was reported. *See* 125 Cong. Rec.

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97th Congress, a generic legislative review bill passed the Senate,[86] but it has not been voted on in the House. During this period, Congress has given extensive consideration to the constitutional arguments regarding such review.[87] At this time, it has reached no resolution of the legislative issues regarding such review, and its consideration is still evolving.

CONCLUSION

The evolution of legislative review indicates three principal reasons why this Court should not accept the respondents' sweeping challenge to all legislative review provisions based on the Presentation Clause. First, legislative review has not served as a means for Congress to enact legislation, the Framers' concern underlying the Presentation Clause. Rather, Congress has enacted legislative review provisions in response to the claims of Presidents, or requests by them, for broad powers. Legislative review has not expanded Congress's power; it has been the means for giving Presidents the broad authority

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E5023 (daily ed. Oct. 12, 1979) (statement of Attorney General Civiletti at hearings on legislative review bills before the Subcommittee on Rules of the House).

[86] 128 Cong. Rec. S2713 (daily ed. March 24, 1982).

[87] *Compare, e.g.,* 128 Cong. Rec. S2572-84 (daily ed. March 23, 1982) (statement by Sen. Schmitt) (defending the constitutionality of legislative review) *with* Subcommittee on Rules of the House, 97th Cong., 1st Sess., *Background Information on Regulatory Reform and Congressional Review of Agency Rules* 11-15 (Subcomm. Print 1981) (criticizing legislative review). The constitutional debate has included consideration of parallel provisions and historic bases. *See, e.g.,* 128 Cong. Rec. S2598 (daily ed. March 23, 1982) (statement of Sen. Levin defending legislative review):

> We should not willingly surrender our right to act on arms sales, we should not willingly surrender our right to act on the sale of nuclear fuel, we should not willingly surrender our right to act under the War Powers Act relative to the introduction of American troops into foreign lands, [and] we should not willingly surrender our right to review the President's decisions on reorganization of the Department of Energy or the Department of Education. . . .

they have sought to reorganize the government after the Depression, to wage World War II, and to deal with the budget, national security, and energy problems of the 1970's, while maintaining the constitutional balance.

Second, the evolution of legislative review shows the varied positions the Presidents have taken and the extensive consideration Congress has given to constitutional issues. It is the role of this Court ultimately to " 'say what the law is.' " *United States* v. *Nixon*, 418 U.S. 683, 703 (1974), *quoting Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Yet the historic relations of the elective branches, growing out of their response to the modern problems of governance, sheds light on constitutional issues. From the adoption of the Reorganization Act in 1939 until the veto of the War Powers Resolution in 1973, no President formally disputed the constitutionality of legislative review other than committee review. Rather, the administrations of Presidents Truman, Kennedy, Johnson, and Nixon not only approved legislative review, but urged Congress to adopt legislative review provisions. In 1941, 1949, 1961, and 1977, Administration legal memoranda explored and justified such provisions' constitutionality. In so doing, the executive branch showed a sound judgment about the actual functioning of such review, not as a device to impair the system of checks and balances, but as a means for making that system work in the face of modern problems.

Finally, a sweeping approach to legislative review cannot responsibly deal with its varied uses and contexts. Even the court of appeals in this case, in declaring section 244 of the INA unconstitutional, restricted its ruling to matters relating to the particular provision, and did not accept the sweeping Presentation Clause argument. It agreed that "the practicality of alternatives to legislative disapproval in other situations raises difficult questions . . . . Such factors might present considerations different from those we find here. . . ." (J.S. 55a.) (footnotes omitted). A sweeping approach would deny to the Court an

understanding of the actual roles of legislative review provisions, with their varying histories, constitutional contexts, and justifications. In cases currently pending, this Court will have the opportunity to examine legislative review in two of its uses: in energy legislation, and in independent agency rulemaking. By focusing on separation of powers, this Court can approach each of these cases on its own merits without prematurely foreclosing its conclusions.

The Court should not accept respondents' sweeping challenge to all legislative review provisions based on the Presentation Clause. Rather, it should focus on the issue of separation of powers and judge the constitutionality of particular legislative review provisions in their particular contexts. We reiterate our conviction that even this limited constitutional inquiry is unnecessary ir the circumstances of this case, *see* Sen. Reply Br. 18, and that the judgment of the court of appeals should be vacated or reversed for the reasons stated in Parts II, III, and IV of our opening brief.

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APPENDIX A

CONGRESSIONAL DISAPPROVALS UNDER THE REORGANIZATION ACTS

As discussed in the brief on pages 11-14, Congress first delegated reorganization authority, subject to legislative review, in 1932. Congress revived such authority in 1939, and thereafter renewed it numerous times. Under the 1932 act, reorganizations were by executive orders subject to Congressional disapproval. From 1939 on, reorganizations were by plans subject to Congressional disapproval. Under the 1939 act, the reorganization authority provided for disapproval by concurrent resolution of both Houses. The 1932 act, and all acts from 1949 on, provided for disapproval by simple resolution of either House.

Presidents have submitted 115 reorganization plans to Congress of which 23 have been disapproved pursuant to legislative review provisions. These disapprovals show the history of use of the legislative review provision without disruption in the separation of powers.

APPENDIX A: CONGRESSIONAL DISAPPROVALS OF REORGANIZATION PLANS

Reorganization Plan	Main Subject	Disapproval Resolution	Congress	Citation
11 Executive Orders	Various	H. Res. 334	72d	78 Cong. Rec. 2126 (1933).
No. 1 of 1946	National Housing Agency	H. Con. Res. 155	79th	92 Cong. Rec. 7911 (1946); 92 Cong. Rec. 8994 (1946).
No. 2 of 1947	Transfer of Administration of Unemployment Service to Department of Labor.	H. Con. Res. 49	80th	93 Cong. Rec. 6740 (1947); 93 Cong. Rec. 7874 (1947).
No. 1 of 1948	Transfer of Employment Service and Bureau of Employment Security to the Department of Labor.	H. Con. Res. 131	80th	94 Cong. Rec. 1721 (1948); 94 Cong. Rec. 2921 (1948).
No. 1 of 1949	Department of Welfare	S. Res. 147	81st	95 Cong. Rec. 11560 (1949).
No. 1 of [illegible]	Office of the Comptroller of the Currency.	S. Res. 246	81st	96 Cong. Rec. 6898 (1950).
No. 4 of 1950	Department of Agriculture	S. Res. 263	81st	96 Cong. Rec. 7235 (1950).
No. 7 of 1950	Interstate Commerce Commission	S. Res. 253	81st	96 Cong. Rec. 7173 (1950).
No. 11 of 1950	Federal Communications Commission	S. Res. 256	81st	96 Cong. Rec. 7177 (1950).
No. 12 of 1950	National Labor Relations Board	S. Res. 248	81st	96 Cong. Rec. 6886 (1950).
No. 24 of 1950	Transfer of Reconstruction Finance Corporation to the Department of Commerce.	S. Res. 290	81st	96 Cong. Rec. 9694 (1950).
No. 27 of 1950	Department of Health, Education and Security.	H. Res. 647	81st	96 Cong. Rec. 9864 (1950).
No. 2 of 1952	Post Office Department	S. Res. 317	82d	98 Cong. Rec. 7495 (1952).
No. 3 of 1952	Bureau of Customs	S. Res. 331	82d	98 Cong. Rec. 7513 (1952).
No. 4 of 1952	Department of Justice	S. Res. 330	82d	98 Cong. Rec. 7503 (1952).
No. 1 of 1956	Departments of the Army, Navy, and Air Force.	H. Res. 534	84th	102 Cong. Rec. 11886 (1956).
No. 2 of 1956	Home Loan Bank Board	H. Res. 541	84th	102 Cong. Rec. 11886 (1956).

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No. 1 of 1959	Transfer of Authorities to the Department of Agriculture.	H. Res. 295	86th	105 Cong. Rec. 12856 (1959).
No. 1 of 1961	Securities and Exchange Commission	S. Res. 148	87th	107 Cong. Rec. 11003 (1961).
No. 2 of 1961	Federal Communications Commission	H. Res. 303	87th	107 Cong. Rec. 10463 (1961).
No. 5 of 1961	National Labor Relations Board	H. Res. 328	87th	107 Cong. Rec. 13078 (1961).
No. 1 of 1962	Department of Urban Affairs and Housing.	H. Res. 530	87th	108 Cong. Rec. 2680 (1962).
No. 2 of 1967	Tariff Commission	S. Res. 114	90th	113 Cong. Rec. 12523 (1967).

APPENDIX B

DISAPPROVALS UNDER THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT

As discussed in the brief on pages 24–26, Congress first delegated budget deferral authority, subject to legislative review, in 1974. Presidents have submitted hundreds of budget deferrals to Congress pursuant to the 1974 act, of which sixty-five have been disapproved. No President has disputed the validity of any of these disapprovals. This history, like the history under the Reorganization Acts, shows extensive use of a legislative review provision without disruption in the separation of powers.

Appendices A and B are based upon data compiled by Clark Norton, Analyst in American National Government, Congressional Research Service, Library of Congress.

APPENDIX B: CONGRESSIONAL DISAPPROVALS OF BUDGET DEFERRALS

Deferral Number	Subject and Amount	Disapproval Resolution	Congress	Citation
D75-81	Corps of Engineers general construction, $43,945,000.	H. Res. 241	94th	121 Cong. Rec. 6345 (1975).
D75-82	Corps of Engineers flood control, $14,503,000	H. Res. 242	94th	121 Cong. Rec. 6346 (1975).
D75-83	Bureau of Reclamation loan program, $900,000	H. Res. 243	94th	121 Cong. Rec. 6346 (1975).
D75-84	Bureau of Reclamation construction and rehabilitation, $17,955,000.	H. Res. 244	94th	121 Cong. Rec. 6346 (1975).
D75-85	Bureau of Reclamation Colorado River basin project, $2,525,000.	H. Res. 245	94th	121 Cong. Rec. 6346 (1975).
D75-86	Bureau of Reclamation storage project, $1,730,000.	H. Res. 246	94th	121 Cong. Rec. 6346 (1975).
D76-74	Department of Agriculture, Resource Conservation and Development, $4,960,000.	H. Res. 916	94th	121 Cong. Rec. 41947 (1975).
D76-79	Environmental Protection Agency, air research and development, $2,000,000.	H. Res. 920	94th	121 Cong. Rec. 41950 (1975).
D76-80	Environmental Protection Agency, water quality research, $4,600,000.	H. Res. 921	94th	121 Cong. Rec. 41950 (1975).
D76-81	Environmental Protection Agency, air control agency grants, $3,750,000.	H. Res. 922	94th	121 Cong. Rec. 41950 (1975).
D76-82	Environmental Protection Agency, water quality control agency grants, $10,000,000.	H. Res. 923	94th	121 Cong. Rec. 41951 (1975).
D76-83	Environmental Protection Agency, Clean Lakes grants, $15,000,000.	H. Res. 924	94th	121 Cong. Rec. 41951 (1975).
D75-94	National Oceanic and Atmospheric Administration, $4,073,000.	H. Res. 309	94th	121 Cong. Rec. 8489 (1975).
D76-68	Agricultural Research Service	H. Res. 910	94th	121 Cong. Rec. 41946 (1975).
D76-69	Animal and Plant Health Inspection Service	H. Res. 911	94th	121 Cong. Rec. 41946 (1975).

D76-70	Agricultural Stabilization and Conservation Service, $90,000,000.	H. Res. 912	94th	121 Cong. Rec. 41947 (1975).
D76-72	Rural water and waste disposal grants, $50,000,000.	H. Res. 914	94th	121 Cong. Rec. 41947 (1975).
D76-73	Department of Agriculture watershed and flood prevention operations, $22,500,000.	H. Res. 915	94th	121 Cong. Rec. 41947 (1975).
D75-107	Department of Housing and Urban Development, comprehensive planning grants program, $50,000,000.	S. Res. 23	94th	121 Cong. Rec. 6432 (1975).
D75-48	Homeownership Assistance Program, $260,000,000.	S. Res. 61	94th	121 Cong. Rec. 6433 (1975).
D75-17	Federal Aid Highways, $10,700,000	S. Res. 69	94th	121 Cong. Rec. 11671 (1975).
D75-115	Research on nuclear powered artificial heart	S. Res. 32	94th	121 Cong. Rec. 13281 (1975).
D75-117	Atomic energy	S. Res. 75	94th	121 Cong. Rec. 13281 (1975).
D75-116	Atomic energy	S. Res. 76	94th	121 Cong. Rec. 13281 (1975).
D75-114	Atomic energy	S. Res. 77	94th	121 Cong. Rec. 13281 (1975).
D75-113	Atomic energy	S. Res. 78	94th	121 Cong. Rec. 13281 (1975).
D75-112	Atomic energy	S. Res. 79	94th	121 Cong. Rec. 13281 (1975).
D75-111	Atomic energy	S. Res. 80	94th	121 Cong. Rec. 13282 (1975).
Not given	Youth Conservation Corps, $10,000,000	S. Res. 205	94th	121 Cong. Rec. 22227 (1975).
D76-13 (D76-13a).	Columbia Basin irrigation project, Washington	S. Res. 226	94th	121 Cong. Rec. 38939 (1975).
D76-49	Emergency Energy Conservation Services, $16,500,000.	S. Res. 267	94th	121 Cong. Rec. 31655 (1975).
D76-68	Northeastern Appalachian Regional Fruit Crop Laboratory, $7,570,000.	S. Res. 313	94th	121 Cong. Rec. 38530 (1975).
D76-69	Fleming Key Animal Import Center	S. Res. 324	94th	121 Cong. Rec. 3966 (1975).
D76-101	Youth Conservation Corps	S. Res. 385	94th	122 Cong. Rec. 5680 (1976).
D76-103	Construction grants to public schools on Indian reservations.	S. Res. 388	94th	122 Cong. Rec. 5680 (1976).
D76-39 and D76-97.	Indian Health Facilities	S. Res. 366	94th	122 Cong. Rec. 5680 (1976).

APPENDIX B: CONGRESSIONAL DISAPPROVALS OF BUDGET DEFERRALS—Continued

Deferral Number	Subject and Amount	Disapproval Resolution	Congress	Citation
D76-96	Army Corps of Engineers, design of hopper dredges, $700,000.	S. Res. 408	94th	122 Cong. Rec. 11050 (1976).
D76-115	Rogers Memorial or Capitol Hill Hospital, $4,000,000.	S. Res. 554	94th	122 Cong. Rec. 32365 (1976).
D76-95	Soil Conservation Service, $18,000,000	H. Res. 1032	94th	122 Cong. Rec. 10553 (1976).
D76-105	Special supplemental food program (women, infants, and children), $61,000,000.	H. Res. 1129	94th	122 Cong. Rec. 10557 (1976).
D76-98	Juvenile Justice and Delinquency Prevention Program, $15,000,000.	H. Res. 1058	94th	122 Cong. Rec. 5503 (1976).
D76-110	Design of Metallurgy Research Center, $688,430	H. Res. 1428	94th	122 Cong. Rec. 27506 (1976).
D78-21	Coast Guard	S. Res. 282	95th	123 Cong. Rec. 36173 (1977).
D77-50	Energy Research and Development Administration, $25,600,000.	H. Res. 305	95th	123 Cong. Rec. 6167 (1977).
D77-51	Energy Research and Development Administration, $5,400,000.	H. Res. 306	95th	123 Cong. Rec. 6168 (1977).
D77-52	Energy Research and Development Administration, biomedical and environmental research.	H. Res. 307	95th	123 Cong. Rec. 6168 (1977).
D78-30	Energy Research and Development Administration, Gas Cooled Thermal Reactor Program, $15,000,000.	H. Res. 851	95th	123 Cong. Rec. 36629 (1977).
D78-33	Energy Research and Development Administration, Fusion Material Test Facility.	H. Res. 852	95th	123 Cong. Rec. 36629 (1977).
D78-34	Energy Research and Development Administration, Magnetic Fusion Energy Program.	H. Res. 853	95th	123 Cong. Rec. 36629 (1977).
D78-35	Energy Research and Development Administration, High Energy Physics Program.	H. Res. 854	95th	123 Cong. Rec. 36629 (1977).

D78-63	Bureau of Reclamation, Garrison Diversion Irrigation Project, $17,700,000.	S. Res. 525	95th	124 Cong. Rec. 25047 (1978).
D79-6	Fishing industry aid, $12,060,000	S. Res. 50	96th	125 Cong. Rec. 4854 (1979).
D79-54	Exploration of National Petroleum Reserve in Alaska, $1,792,000.	H. Res. 239	96th	125 Cong. Rec. 15565 (1979).
D80-57	Youth Adult Conservation Corps, $27,500,000	H. Res. 449	96th	126 Cong. Rec. S8960 (daily ed. June 30, 1980).
D80-65a	Environmental Protection Agency, grants for waste treatment works, $3,647,948,114.	S. Res. 470	96th	126 Cong. Rec. S10532 (daily ed. August 1, 1980).
D80-56	Construction of Cumberland Gap Tunnel, $15,500,000.	S. Res. 464	96th	128 Cong. Rec. S10532 (daily ed. August 1, 1980).
D81-95, D81-96	Veterans Administration, medical care staffing funds, $29,389,000 and $1,690,000.	S. Res. 120	97th	127 Cong. Rec. S5658 (daily ed. June 2, 1981).
D82-193	Office of Juvenile Justice and Delinquency Prevention, $70,000,000.	S. Res. 260	97th	127 Cong. Rec. S15241 (daily ed. Dec. 15, 1981).
D82-236	Department of Energy, Fossil Energy Research and Development, $44,883,000.	H. Res. 411	97th	128 Cong. Rec. H1660 (daily ed. April 29, 1982).
D82-240	Department of the Interior, Historic Preservation Fund, $781,000.	H. Res. 474	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-239	Department of the Interior, Land and Water Conservation Fund, $2,821,000.	H. Res. 475	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-238	Department of the Interior, Urban Park and Recreation grants, $858,000.	H. Res. 476	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-10a	Department of Energy, Strategic Petroleum Reserve, $52,860,000.	H. Res. 479	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-247	Fish and Wildlife Service, land acquisition, $400,000.	H. Res. 493	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-246	Department of the Interior, construction, $600,000.	H. Res. 494	97th	128 Cong. Rec. H4888 (daily ed. July 29, 1982).

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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1982

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v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

BRIEF FOR APPELLANT-RESPONDENT IMMIGRATION AND NATURALIZATION SERVICE IN RESPONSE TO THE SUPPLEMENTAL BRIEFS ON REARGUMENT FOR THE UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES

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TABLE OF AUTHORITIES

Cases:	Page
Buckley v. *Valeo*, 424 U.S. 1	5
Consumer Energy Council of America v. *FERC*, 673 F.2d 425, appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209	4, 6
Currin v. *Wallace*, 306 U.S. 1	18
Dames & Moore v. *Regan*, 453 U.S. 654	13
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Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579	7

Constitution and statutes:	
United States Constitution:	
Article I	2, 3, 4, 5
Section 1	2, 3, 4
Section 7	2
Clause 2 (Presentation Clause)	4, 5, 9
Clause 3 (Presentation Clause)	4, 8, 9, 10
Section 8	2, 4
Clause 1	4
Clause 11	19
Section 9, Clause 7	8
Article II, Section 3	8, 11
Pa. Const. (1776):	
§ 15	10
§ 20	11
Immigration and Nationality Act, ch. 477, 66 Stat. 163, 8 U.S.C. (& Supp. V) 1101 *et seq.*:	
Section 244(c), 8 U.S.C. 1254(c)	2
Section 244(c)(2), 8 U.S.C. 1254(c)(2)	7, 13
Impoundment Control Act of 1974, 31 Stat. 1403(b)	16
War Powers Resolution, 50 U.S.C. 1544(c)	16

Miscellaneous: Page

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pp. 7026-7027 13
p. 8609 14
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p. 2445 14
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pp. 4610-4614 14
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Miscellaneous—Continued

	Page
43 Op. Att'y Gen. No. 10 (Jan. 31, 1977)	17
Price Control Bill: Hearings on H.R. 5479 Before the House Comm. on Banking and Currency, 77th Cong., 1st Sess. (1941)	17
Pub. Papers:	
(1956)	15
(1963)	15
(1964)	15
(1978)	16
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p. 132	15
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p. 433	15
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v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

No. 80-2171

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BRIEF FOR APPELLANT-RESPONDENT IMMIGRATION AND NATURALIZATION SERVICE IN RESPONSE TO THE SUPPLEMENTAL BRIEFS ON REARGUMENT FOR THE UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES

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1. The Senate and House of Representatives once again have wholly failed to overcome the fundamental defect of the legislative veto provision in Section 244(c) of the Immigration and Nationality Act: its inconsistency with the explicit and repeated commands in Article I, Sections 1, 7 and 8 of the Constitution that all actions of the Legislative Branch, before they may be given a legally binding effect outside that Branch, must be passed by both Houses of Congress and be approved by the President or repassed over his veto by two-thirds of each House.

We refer the Court to the discussion of the bicameralism and presentation requirements in our principal brief (INS Br. 15-43), which we will not repeat here. There we demonstrate: (i) that the text of Article I does not itself permit one House of Congress to take action that will bind a coordinate Branch or affect the rights and liabilities of the people (INS Br. 17-21); (ii) that the text of Article I also forecloses Congress from accomplishing what the Constitution itself does not permit simply by enacting a law authorizing one of its Houses to pass a resolution purporting to have a legally binding effect outside the Legislative Branch (INS Br. 21-26); (iii) that the purposes underlying the requirements of bicameral approval and presentation to the President strongly reinforce the conclusion, compelled by the text of Article I, that the one-House veto provision in Section 244(c) of the Act is unconstitutional (INS Br. 26-34); and (iv) that the unconstitutionality of Section 244(c) is further reinforced by the fact that in those situations in which the Framers intended to permit a departure from the requirements of bicameral action and presentation to the President, they expressly so provided in the Constitution itself (INS Br. 34-39).

Neither the Senate nor the House of Representatives has responded directly to these arguments. The Senate instead devotes the bulk of its Supplemental Brief (at 9-40) to a discussion of the evolution of legislative veto

devices since 1932, a discussion that has no relevance to the question of the constitutionality of such devices (see pages 13-20, *infra*). The House largely repeats the arguments made in its previous brief concerning the Necessary and Proper Clause, Congress' power over aliens, and what the House perceives to be threshold procedural issues, arguments we have answered in our principal brief. INS Br. 46-47, 51-52, 73-77.

With regard to the explicit procedural requirements in Article I of the Constitution for the exercise of powers by the Legislative Branch, the Senate simply asserts (Sen. Supp. Br. 4) that these requirements may be ignored in the case of a resolution passed by one House of Congress to veto action taken by an Officer of the United States in the administration of the laws because such a resolution is not "original legislation," but rather constitutes the exercise of authority conferred on that House by a previously enacted law. The House of Representatives likewise asserts (House Supp. Br. 4-10), without any discussion whatever of the constitutional provisions involved or the intent of the Framers underlying them, that the House of Representatives' passage of the resolution disapproving the grant of permanent resident status to Chadha was not subject to those requirements because it did not constitute "lawmaking."

As we show below, the effort by the Senate and House of Representatives to dismiss the application of the bicameralism and presentation requirements to legislative vetoes in this fashion not only is without affirmative support in the text and background of the pertinent constitutional provisions; it is directly contrary to that text and background. It is important as well to stress the breadth of the arguments advanced by the Senate and House of Representatives. Those arguments would validate every legislative veto provision, including omnibus legislation authorizing a one-House veto of every decision made by an Officer of the United States in the administration of the law. This attempt fundamentally to recast

the constitutional plan established by the Framers must be rejected.

a. Nothing in the text of Article I suggests that the provisions for bicameral approval and presentation to the President apply only when the end product of the legislative action is formally labeled a "law" or, in the Senate's new terminology, "original legislation." Article I, Section 1 and Section 8, Clause 1 vest *all* legislative powers in the "Congress," and therefore jointly in the Senate and House of Representatives that together comprise the Congress. The requirement of concurrent action by the two Houses in all situations except those in which the Constitution expressly provides otherwise thus is not dependent upon the form in which power is exercised by the Legislature or the label attached to the action.[1]

The Presentation Clauses likewise offer no textual support for the Senate and House of Representatives' argument. To be sure, Section 7, Clause 2 of Article I does use the word "Law," providing that "Every Bill which shall have passed the House of Representatives and the Senate, shall *before it becomes a Law*, be presented to the President of the United States * * *" (emphasis added). But Clause 3 of Article I, Section 7 does not use the word "Law." It provides in sweeping language that *"Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; *and before the Same shall take Effect*, shall be approved by him, or

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[1] The debates on what is now Article I, Section 1 indicate that the Framers specifically intended that Section to embody a bicameralism requirement for all legislative acts and to apply in all instances except those in which a particular function had been explicitly assigned by the Constitution to just one House, such as the ratification of a treaty. 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 196-197 (1974). See also *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 464 n.165 (D.C. Cir. 1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209; INS Br. 23 n.10.

being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill" (emphasis added). Thus, *no* order, resolution, or vote requiring concurrent action by the two Houses—*i.e.*, no measure by which Congress seeks to impose its will on a coordinate Branch or on the people, and which is therefore "legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897))—can "take Effect" without the President's approval or repassage by two-thirds of each House over his veto, whether or not the measure will formally "become[] a Law" in the manner contemplated for the "Bills" mentioned in Clause 2. Accordingly, the text of the Presentation Clauses refutes the contention that those Clauses were lawfully avoided in this case on the premise that the resolution of disapproval passed by the House of Representatives was not conceived as a "law" or "original legislation."

b. The Senate and House of Representatives' argument for avoiding the bicameralism and presentation requirements also is flatly inconsistent with the purposes of the pertinent provisions of Article I. Those provisions were intended by the Framers to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive in whatever form that action might take. The Framers feared the propensity of unicameral legislative bodies to yield to sudden impulses, and thereby to threaten personal liberties and the stability of the social order, and they sought to protect against this propensity by the inclusion of "self-executing safeguard[s]"[2] that would ensure an opportunity for due deliberation by the second House of the Legislature and independent consideration by the President. See INS Br. 26-34.

The Senate and House of Representatives do not dispute our submission that the foregoing concerns underlie

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[2] *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976).

the requirements of bicameral action and presentation to the President.[3] Once this much is conceded, it follows a fortiori that the one-House legislative veto device is unconstitutional, for these purposes of the Framers apply equally to the passage of legislative veto resolutions.

The present case vividly illustrates the point. The resolution of disapproval was passed by the House of Representatives in haste at the close of the legislative session; its consideration therefore plainly would have benefited from the opportunity for due deliberation by the Senate and independent review by the President, after he received the advice of those responsible for administering the immigration laws. Moreover, a regime under which the Attorney General's granting of relief pursuant to a duly enacted law may be overturned on an ad hoc and standardless basis substantially undermines the stability of the laws intended by the Framers, directly implicates their fears of tyranny and arbitrary action by the Legislature, and encroaches upon the powers of the Executive in administering the Immigration and Nationality Act. It is inconceivable that the Framers nevertheless intended that the checks they fashioned against these eventualities could be ignored simply because the action in question does not purport to be "original legislation," but instead was authorized by a previously enacted law.[4]

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[3] Moreover, as the United States Court of Appeals for the District of Columbia Circuit observed in *Consumer Energy Council of America* v. *FERC*, *supra*, 673 F.2d at 464, the requirement of bicameral action also is a critical aspect of the Great Compromise, under which one House of Congress represents the people and the other the States. Although this aspect may not be implicated in the instant case, the possibility of a one-House legislative veto of administrative action on a question about which the people in the several States may have divergent views, such as the matters of energy pricing involved in the *FERC* case, underscores the importance of bicameral action.

[4] The Senate asserts (Sen. Supp. Br. 4) that the purposes of bicameral consideration and presentation to the President were sufficiently served in 1952, when the Immigration and Nationality

The requirements of bicameral approval and presentation to the President thus are properly viewed as formidable barriers standing between the Legislative Branch on the one hand and the coordinate Branches and the people on the other, such that compliance with those requirements is an "irreducibl[y] minimum"[5] prerequisite for the Legislature to work its will. In this respect, the limitations in Article I of the Constitution on the exercise of power by Congress are directly analogous to the limitation in Article III that the Judicial Branch may exercise power only in "Cases" or "Controversies" that are brought before it. The latter provision is an essential institutional limitation on the exercise of power by the Judicial Branch to affect individual interests and to invalidate the actions of a coordinate Branch. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982). The Executive Branch is comparably restrained, most prominently by the fact that, aside from the functions expressly or impliedly conferred on the President by the Constitution itself, the Executive may act only pursuant to or in the execution of a previously enacted law. See Article II, Section 3 (the President "shall take Care that the Laws be faithfully executed"); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-588 (1952); Article I, Section 9, Clause 7 ("No Money

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Act, including Section 244(c)(2), was enacted over the President's veto (ch. 477, 66 Stat. 163, 216, 281-282). Thus, it contends that there was no need for the resolution passed by the House of Representatives 23 years later, disapproving the granting of permanent resident status to Chadha, to receive the concurrence of the Senate or to be presented to the President for his consideration. This contention is in error. The consideration by Congress and the President in 1952 of the mechanism in Section 244(c)(2) for granting permanent resident status did not serve to protect against arbitrary action by one House of Congress—the essence of the legislative tryanny the Framers feared—when that House considers whether a particular alien should become a permanent resident alien.

[5] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Enforcement in this case of the constitutionally prescribed requirements of bicameralism and presentation to the President will assure adherence to these functional roles the Framers intended for the respective Branches of Government.

c. The argument by the Senate and House of Representatives reduces to the contention that the Article I requirements of bicameral approval and presentation to the President may be evaded or dispensed with by Congress—the very Branch whose powers were intended to be restrained—simply by the passage of so called "original legislation" that authorizes one House of Congress to pass a resolution having a legally binding effect. To state such an illogical proposition is sufficient to refute it. But in addition, the origins of Clause 3 of Article I, Section 7—which applies to "Every Order, Resolution or Vote" to which the concurrence of the two Houses is necessary—demonstrate that it was adopted for the specific purpose of foreclosing evasion of the presentation requirement by Congress through the passage of measures other than "Bills," such as "Resolutions, votes &c." See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 301-302, 304-305 (1974); INS Br. 24-25. It would be directly inconsistent with this deliberately all-inclusive thrust of Article I, Section 7 to recognize an implied exception for the "resolution" of disapproval passed by the House of Representatives in this case.

The Senate attempts to avoid the force of this conclusion by contending (Sen. Supp. Br. 5-8) that despite the broad language of Clause 3 and its purpose to avoid evasion of the presentation requirement, that Clause applies only to "resolutions" for the enactment of "original legislation," not resolutions embodying legislative vetoes of Executive action. Even if this interpretation of the term "Resolution" in the Clause were correct, the resolution of disapproval in this case would come within the sweep of Clause 3 because it was adopted by a "Vote" of the House of Representatives and in substance consti-

tuted an "Order" to the Attorney General to deport an alien who had been found eligible under the law for permanent resident status.

The Senate points to nothing in the constitutional text or debates revealing an affirmative intent to exclude from the Presentation Clauses some resolutions that are legislative in their character and effect, such as the resolution of disapproval at issue here. Rather, the Senate relies on the *Report of the Committee of the Council of Censors*, published in 1784, discussing the experience under certain provisions of the Pennsylvania Constitution. Specifically, the Senate points out that in one portion of its report, the Council of Censors criticized the actions of the Pennsylvania General Assembly in avoiding a constitutional requirement that bills of a public nature be printed and lie over until the following session of the Assembly before adoption. The General Assembly accomplished this evasion through the passage of "resolves," secretly and immediately, that made or amended laws and appropriated the lands, goods and money of the Commonwealth. Sen. Supp. Br. 7. From this, the Senate contends that Madison's argument when proposing what is now Clause 3 of Article I, Section 7 that Clause 2 could be evaded by passage of "Resolutions" must be read to refer only to resolutions providing for the enactment of "original legislation." Sen. Supp. Br. 5-8.

Neither the Council of Censors' report nor Madison's remarks contain the slightest suggestion of the distinction the Senate posits. To the contrary, the Council's concerns and the Framers' references to them strongly confirm that the Presentation Clauses apply to all resolutions, including those embodying legislative vetoes of Executive action, that purport to have a legally binding effect on a coordinate Branch or affect the rights and liabilities of the people.

The express purposes of the publication and layover requirements discussed by the Council were to ensure that laws were "maturely considered" and to protect

against the "inconvenience of hasty determinations" (Pa. Const. § 15 (1776), quoted in Sen. Supp. Br. 5 n.4.) —purposes that the requirements of bicameral action and presentation to the President under the Federal Constitution also were designed to advance. In addition, Madison's discussion of this experience in Pennsylvania in *The Federalist* No. 48, cited by the Senate (Sen. Supp. Br. 7 & n.11), is part of a paper emphasizing the importance of protecting against improvidence and usurpation by the Legislative Branch, and he described the requirement in the Pennsylvania Constitution that bills be previously printed for the consideration of the people as one of the chief precautions provided in that Constitution "against improper acts of the legislature." *The Federalist* No. 48, quoted in Sen. Supp. Br. 8 n.11. Madison's discussion obviously undermines rather than supports the Senate's argument for avoiding another check against unwise legislative action, and especially for avoiding Clause 3 of Article I, Section 7, which Madison proposed for the very purpose of foreclosing evasion by Congress of the check furnished by the President's veto power.

In addition, the Senate fails to point out that the introductory pages of the Council of Censors' report contain an extensive criticism of the Pennsylvania General Assembly's practices that is directly applicable to the legislative veto device. The Council criticized the Assembly for acting by "summary resolutions" rather than raising a "superstructure of law, after mature deliberation, and clothed with the solemnities of enacting, which give weight and dignity, as well as public notoriety to the statute." *The Constitution of the Commonwealth of Pennsylvania * * * To Which Is Added A Report of the Committee To Enquire * * * As Adopted By The Council of Censors* 36 (Printed by Francis Bailey, Phila., 1784). The Committee, quoting Locke, expressed the opinion "that the legislative cannot assume to itself, a power to rule by extemporary and arbitrary decrees," but rather must "decide the rights of the subject by *promulgated*

standing laws, and known authorized judges" (*id.* at 37; emphasis in original). After examining past practices, the Committee concluded that the "practice of entering into personal discussions, and hasty votes, too often in contradiction to express laws, solemnly enacted," had "been too much countenanced" (*ibid.*). The legislative veto device raises precisely these concerns.

It also is significant to note that in a separate report adopted by the Council of Censors in 1784, the Council criticized violations of a provision in Section 20 of the Pennsylvania Constitution of 1776 which provided—in terms identical to Article II, Section 3 of the Federal Constitution—that the Executive "shall take care that the laws be faithfully executed." The Committee objected that the Executive Branch had "yielded executive power to the legislative" by conferring with the General Assembly through its committees concerning the prosecution and settlement of matters for which the Executive had been vested by law with responsibility. The Council of Censors observed that "a resolve of the House could not add thereto," and that with respect to the settlement of accounts, "the Assembly had nothing to do with them, nor without passing a law could intermeddle." *Report of the Committee of the Council of Censors* * * * *On The Executive Branch of Government* * * * *As Adopted By The Said Council* 8-9 (Printed by Francis Bailey, Phila., 1784). Surely, the Council of Censors would not have found this practice of "intermeddl[ing]" by the Assembly short of "passing a law" consistent with the Executive's constitutional duty to take care that the laws be faithfully executed if only the Assembly had passed a law authorizing that practice.

Finally, the remark of Gouvernor Morris during the debates on the Presidential veto, cited by the Senate (Sen. Supp. Br. 7), was a reference to the Council's report on what Morris termed "the many invasions of the legislative department on the Executive" (2 M. Farrand, *supra*, at 299), and Morris suggested that the

President have an *absolute* negative over the actions of the Legislature to strengthen the Executive's check against such incursions (*id.* at 299-300). Against the background of the Council of Censors' concerns, Morris' remarks underscore that the President's veto power cannot be avoided in the manner the Senate and House of Representatives suggest.[6]

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[6] The House of Representatives once again seeks to justify the vesting of disapproval authority in one House of Congress by contending that under Section 244(c)(2) an alien simply appeals to Congress, through the Attorney General, for a legislative "act of grace" permitting him to obtain permanent resident status. House Supp. Br. 4-5, 9, 23-24. As we have previously explained (INS Br. 40-43), this characterization is both inaccurate and irrelevant. As the American Bar Association aptly puts it in its amicus brief (at 21): "Legislative mercy, like legislative justice, or for that matter legislative severity, must be meted out by legislation."

The extravagance of the House's assertions regarding Congress' power to perform "acts of grace" in any manner it chooses also calls to mind Blackstone's fears, quoted by the court of appeals, about the power of a single magistrate to enact tyrannical laws and execute them in a tyrannical manner, "since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself" (J.S. App. 31a, quoting 1 W. Blackstone, *Commentaries* 146-147 (1979)). These concerns apply equally where the Legislature chooses to designate itself or one of its Houses as the "dispenser of justice," unchecked by the Executive.

The ABA's observation also is the complete answer to the House of Representatives' pervasive contention that with respect to the admissibilty of aliens, as with other "public rights," Congress may reserve that power to itself or may delegate it to Executive or Judicial tribunals. See generally House Supp. Br. 10-22, 24-29. We do not dispute that Congress may reserve its Article I powers over aliens rather than assign those functions to the Executive or Judicial Branches. But when Congress chooses to exercise the power it has reserved, by providing for the admission, expulsion, or permanent residence of an alien or class of aliens, it must do so in the same manner in which it exercises any of its legislative powers—through the enactment of a law or other measure that has received the concurrence of both Houses and been presented to the President. Once enacted into law, that exercise of legislative power must be executed by the Executive, not by Congress, as is made clear by the decisions of this Court concerning the power of Congress over aliens. See INS Br. 46-47.

2.a The Senate devotes most of its Supplemental Brief (at 9-40) to a discussion of the inclusion of legislative veto provisions in various statutes beginning in 1932. This discussion has no relevance to this case, however, for it does not offer any basis for concluding that the legislative veto device is constitutional.

The mere fact that Congress has chosen to enact legislative veto provisions obviously does not render them constitutional, because "[p]ast practice does not, by itself, create power" (*Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981)). Indeed, the increasing frequency of such enactments over the last decade and the pendency of even more far-reaching bills that would comprehensively subject all administrative rules to a legislative veto (see Sen. Supp. Br. 37-38) serve to underscore that a decision by this Court sustaining the constitutionality of Section 244(c)(2) would pose a substantial threat to the independence of the Executive Branch, the doctrine of separation of powers, and the efficacy of the Constitutional checks on improvident legislative action.

b. Nor does this case even remotely resemble *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473 (1915), cited by the Senate (Sen. Supp. Br. 10-11 & n.15). There the Court relied upon a consistent and longstanding Executive practice, known to and acquiesced in by Congress, in concluding that the Executive action there at issue was authorized. See also *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 686. In the present case, there has been a longstanding history of *disagreement* between the Executive and Legislative Branches, and even within the Legislative Branch itself, regarding the constitutionality of the legislative veto. The Senate's attempt to create the contrary impression is seriously misleading.

In 1920, President Wilson vetoed a bill bestowing significant powers on a congressional joint committee to override actions of the Executive on the ground that it violated the doctrine of separation of powers (59 Cong. Rec. 7026-7027 (1920)), and he likewise vetoed the Budget Act of 1920, which authorized the removal of the Comp-

troller General by concurrent resolution of Congress (*id.* at 8609). As the Subcommittee on Separation of Powers of the Senate Judiciary Committee observed in 1969 after reviewing the relevant history, "[e]ver since the administration of President Wilson, disputes have arisen between Congress and the President regarding attempts by Congress to insert legislative veto provisions in statutes." S. Rep. No. 91-549, 91st Cong., 1st Sess. 14 (1969).

Thus, although, as the Senate notes, President Hoover initially suggested and subsequently signed legislation providing that one House of Congress be given an opportunity to veto reorganization plans proposed by the President (Sen. Supp. Br. 11 & nn.17 and 18), he later vetoed a bill containing a committee veto provision on the strength of an opinion of the Attorney General which expressed the view that there was a "grave question" about the constitutionality of the legislative veto provision in the reorganization statute. 76 Cong. Rec. 2445 (1933); 37 Op. Att'y Gen. 56, 63-64 (1933). Largely because of the Attorney General's opinion, the reorganization authority reenacted in 1933 did not contain a legislative veto provision. See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1012-1013 (1975); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 577 (1953); 76 Cong. Rec. 3537-3544, 4610-4614 (1933).

President Roosevelt subsequently sought renewal of reorganization authority without the legislative veto provision, contending that Congress could not invalidate the President's action by a mere resolution (83 Cong. Rec. 4487 (1938)), although he later receded from his resistance to the legislative veto in the reorganization context in the face of political realities.[7] Even so, as the Senate

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[7] See generally L. Fisher & R. Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, in Congressional Research Service, U.S. Library of Congress, 96th Cong., 2d Sess., *Studies on the Legislative Veto* 165, 187-194 (House Rules Comm. Print 1980).

concedes (Sen. Supp. Br. 13 & n.24), the congressional debates reflected a deep division within the Congress on the constitutionality of the legislative veto device. See Ginnane, *supra*, 66 Harv. L. Rev. at 578-581. President Roosevelt also signed into law provisions in various statutes passed immediately before and during World War II providing for the termination of powers by concurrent resolution. Sen. Supp. Br. 15-16. But it is clear that President Roosevelt's approval of these war time measures did not reflect the view that they were constitutional. See Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357-1358 (1953).

Subsequent Presidents also repeatedly and publicly expressed the view that congressional veto provisions are unconstitutional. It is true, as the Senate points out (Sen. Supp. Br. 18 & n.39), that these views were expressed in connection with bills that provided for vetoes of or other manner of control over administrative action by congressional committees, but this reflects nothing more than the fact that this was the form of legislative veto device Congress had included in the bills involved. The Senate fails to note that the basis of the President's opposition was almost invariably that such measures are inconsistent with the constitutional doctrine of separation of powers by allowing congressional participation in the execution of the laws [8]—a legal position that applies equally to legislative vetoes by one or both Houses as well as by committees. Thus, the Senate is simply wrong in intimating (Sen. Supp. Br. 18-19, 24) that Presidents during this period had uniformly accepted the constitutionality of the one-House or two-House legislative veto.

Moreover, as the Senate concedes (Sen. Supp. Br. 24-25, 30, 37), Presidents Nixon, Ford and Carter all took the

[8] See 97 Cong. Rec. 5374-5375 (1951) (Pres. Truman); 98 Cong. Rec. 9756 (1952) (Pres. Truman); 100 Cong. Rec. 7135 (1954) (Pres. Eisenhower); 101 Cong. Rec. 10460 (1955) (Pres. Eisenhower); 102 Cong. Rec. 12959 (1956) (Pres. Eisenhower); Pub. Papers 648-650 (1956) (Pres. Eisenhower); Pub. Papers 6 (1963) (Pres. Kennedy); Pub. Papers 861-862, 1249-1251 (1964) (Pres. Johnson); 1 Weekly Comp. Pres. Doc. 132, 432, 433 (1966) (Pres. Johnson); 111 Cong. Rec. 12639-12640 (1965) (Pres. Johnson).

position that statutes providing for one or both Houses of Congress to overturn Executive action by the passage of a resolution were unconstitutional. Indeed, President Carter sent a formal message to Congress on the subject, in light of the increasing frequency with which such measures had been enacted. Pub. Papers 1146 (1978).[9]

The history of the legislative veto device therefore is essentially one of disagreement between the Legislative and Executive Branches, and even within the Legislative Branch itself, on the constitutional question.[10] This di-

[9] Despite President Carter's firm statement, the Senate twice attempts to convey the misleading impression that President Carter, in his special message, characterized the legislative veto provisions in the War Powers Resolution, 50 U.S.C. 1544(c), and the Impoundment Control Act of 1974, 31 U.S.C. 1403(b), as "constructive safeguards." See Sen. Supp. Br. 25 n.55, 27 & n.62. That is not what President Carter said. The message took the position that legislative vetoes are unconstitutional. In the passage quoted by the Senate, President Carter simply observed that the desire for the legislative veto stems in part from Congress' mistrust of the Executive, due to abuses of years past, and that Congress responded to those abuses by enacting "constructive safeguards" in such areas as war powers and the budget process. Pub. Papers 1149 (1978). He did not state that the legislative veto provisions of the war power and impoundment statutes were "constructive," much less constitutional. Indeed, in the very next sentence, he reiterated that the legislative veto "is an overreaction which increases conflict between the branches of government." *Ibid.*

Similarly, the Senate's statement (Sen. Supp. Br. 30-31) that President Carter "accepted" certain legislative vetoes relies only on a response to a question at a news conference about the House of Representatives' recent insertion of such a provision in a pending gas rationing bill (15 Weekly Comp. Pres. Doc. 1311 (1979)) and reflects nothing more than the political realities that occasionally have confronted Presidents when Congress has insisted on legislative veto provisions. The comment does not reflect the view that such measures are constitutional.

[10] Contrary to intimations in the Senate's Supplemental Brief, legal memoranda prepared by several agency officials over the years do not support the Senate's broad assertion of the constitutionality of legislative vetoes generally or an expression by the Executive to that effect. The Senate first cites (Sen. Supp. Br. 16 n.33) a 1941 statement prepared by the General Counsel of the Office of Price Administration supporting the constitutionality of the provision

vision is manifest in this case. The Executive Branch takes the firm position that the legislative veto device is unconstitutional, and a number of Members of the House

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in a pending bill permitting Congress, by concurrent resolution, to terminate the price control authorization. *Price Control Bill: Hearings on H.R. 5479 before the House Comm. on Banking and Currency*, 77th Cong., 1st Sess. 983 (1941). Previously in the hearings, however, the General Counsel had confessed that his "ignorance on the subject of the validity of a concurrent resolution is complete." *Id.* at 400. Moreover, the statement he subsequently furnished the committee was guarded and narrowly limited to the situation in which Congress simply acts as a finder of fact for the termination of previously granted authority, rather than declaring legislative policy. He stressed that giving legal effect to a concurrent resolution expressing legislative policy would deny the President the opportunity to review that policy. *Id.* at 983-984. Moreover, even as confined to the validity of the provision for termination of authority by concurrent resolution based on a congressional finding of fact, the General Counsel's views were inconsistent with those of President Roosevelt, who viewed such resolutions as an unconstitutional means of repealing legislation. See Jackson, *supra*, 66 Harv. L. Rev. at 1358.

The 1949 memorandum of the Department of Justice, also cited by the Senate (Sen. Supp. Br. 17-18), concerned the narrow issue of reorganization authority, and it characterized the legislative veto provision as in the nature of a contract between the President and Congress under which the President personally undertook to put no reorganization plan into effect if Congress expressed its disapproval. S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949); see Watson, *supra*, 63 Calif. L. Rev. at 1014 n.143. That reasoning, which is seriously flawed as a constitutional matter, plainly has no application where, as here, the rights of private parties are directly implicated by the veto. The testimony of Assistant Attorney General Wozencraft, cited by the Senate (Sen. Supp. Br. 20 n.43), likewise was limited to legislative vetoes in the reorganization context and did not suggest that such vetoes would be constitutional in other settings. See also 43 Op. Att'y Gen. No. 10 (Jan. 31, 1977); INS Br. 58 n.37.

The memorandum by the General Counsel of the Department of Agriculture in 1966, cited by the Senate (Sen. Supp. Br. 20 n.42), concerned a provision for the submission to Congress of programs for the marketing of commodities. The memorandum's discussion of the constitutionality of the legislative veto was limited. It first quoted a paragraph from the House Report on the 1939 Reorganization Act. It then stated a two-sentence conclusion that (i) the veto

of Representatives who are Subcommittee Chairmen have filed a brief as amici curiae in this case agreeing with the Executive's position that such provisions are unconstitutional. See Br. for Rep. Philip Burton, et al.; see also H.R. Rep. No. 97-809 (Pt. II), 97th Cong., 2d Sess. 12-18 (1982).

c. The Senate also asserts (Sen. Supp. Br. 9-10), on the basis of the history of Congress' insertion of legislative veto provisions in statutes, that the function of the legislative veto device has been to preserve the balance between the elected Branches. This assertion is clearly in error, for the legislative veto device is manifestly inconsistent with the balance the Framers struck between the two Branches.

Nor, contrary to the Senate's contention (Sen. Supp. Br. 9-10), can the legislative veto device be justified, and the carefully crafted constitutional protections ignored, simply because Congress may on occasion be ambivalent about vesting broad authority in the Executive. The Framers were aware of the need that might arise to terminate authority if Congress concludes that it has been unwisely conferred and of the tension between preserving Legislative prerogatives and ensuring needed Executive flexibility. During the debates in the Constitutional Convention on the President's veto power, concern was expressed that if three-fourths of each House were

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was supported by cases sustaining Acts of Congress making the application of provisions in agricultural statutes subject to producer referenda (*e.g.*, *Currin* v. *Wallace*, 306 U.S. 1 (1939)), and (ii) the President's veto power was not bypassed because he was to submit the plans to Congress. *Legislative Policy of the Bureau of the Budget: Hearings Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 89th Cong., 2d Sess. 31-32 (1966). This opinion hardly represents a considered legal judgment on the question, and there is no indication that the President or Attorney General concurred in it. We have answered in our principal brief (INS Br. 55-56 & n.36) the argument that *Currin* v. *Wallace* supports a provision for Congress to veto Executive action under a duly enacted law: Congress cannot attach an unconstitutional condition to the assignment of authority to the Executive. See also Ginnane, *supra*, 66 Harv. L. Rev. at 595.

required to override a Presidential veto, "the repeal of bad laws might be rendered too difficult" (2 M. Farrand, *supra*, at 586 (remarks of Mr. Williamson); see also *ibid.* (remarks of Col. Mason)). There was no suggestion in response that this difficulty could be avoided simply by providing in the law itself that its effect could be terminated or its application to particular situations negated by action of Congress that would avoid altogether the possibility of a Presidential veto.[11] Rather, Madison responded to this concern by stating: "As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws so as to require renewal instead of repeal" (*id.* at 587).

Madison's response applies equally to the Senate's assertions in this case: in "doubtful cases" where Congress is uncertain about the wisdom of enacting particular legislation, it may limit the duration of the authority granted in order to ensure that Congress can take a fresh look at the legislative policy in light of experience under it and change that policy without the need to override a Presidential veto if the President does not agree that it should be changed.

Indeed, the Constitution itself contains a model for this approach, providing that no appropriation to raise and support armies "shall be for a longer Term than two Years." Article I, Section 8, Clause 11. This provision was viewed as establishing a necessary accommodation between the need to preserve Legislative accountability for military efforts, and thereby to limit Executive power in this area, with the need to preserve flexibility to meet unforeseen contingencies. See, *e.g.*, *The Federalist* No. 24, at 158 (A. Hamilton) (Rossiter ed. 1961); *The Federalist* No. 26, *supra*, at 171-174 (A. Hamilton); *The Federalist* No. 41, *supra*, at 256-260 (J. Madison). Any suggestion that the system of checks and balances in the

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[11] Indeed, Gouvernor Morris expressed the view that making repeal too easy would cause "instability" and that experiments in public policy that are initially unpopular should be given an opportunity to prove their worth. 2 M. Farrand, *supra*, at 586.

Constitution must give way because of practicalities not foreseen by the Framers therefore is without merit.

Moreover, as the American Bar Association explains in its amicus brief (Br. 9-15), there are substantial grounds for concluding that the legislative veto device, even if it were consistent with the Constitution, is not a useful means of addressing the problems of delegation of authority by Congress identified by the Senate. Indeed, the device may often prove counterproductive, because it may interfere with the regularity of administrative and legislative procedures and actually encourage broad and unwise delegations of authority by Congress in the first instance, thereby undermining the Senate's professed goal of preserving political accountability for administrative action. See generally ABA Br. 9-15, and materials cited; Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977); McGowan, *Congress, Court, and Control of Delegated Powers*, 77 Colum. L. Rev. 1119, 1145-1148 (1977); H.R. No. 97-809, *supra*, at 12, 18; Subcomm. on Rules of the House Comm. on Rules, 97th Cong., 1st Sess., *Background Information on Regulatory and Congressional Review of Agency Rules* 16-19 (Comm. Print 1981). But even if there were a consensus that the legislative veto is a sound means to bring order and accountability to the Federal Government, the implementation of this fundamental change in our system of government would require an amendment of the constitutional provisions that unambiguously foreclose such a combining of powers in the Legislative Branch and circumvention of the Presidential veto power.

For the foregoing reasons and the additional reasons stated in our principal brief, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

REX E. LEE
Solicitor General

DECEMBER 1982

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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

MOTION FOR LEAVE TO FILE THIRD SUPPLEMENTAL BRIEF AND THIRD SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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MOTION FOR LEAVE TO FILE THIRD SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of appellant-respondent Immigration and Naturalization Service, respectfully moves for leave to file the attached Supplemental Brief to bring to the Court's attention the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees* v. *Samuel R. Pierce, Secretary of Department of Housing and Urban Development*, No. 82-2372 (Dec. 8, 1982). In its opinion in that case, the court of appeals held unconstitutional a provision in the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1164, that bars the use of appropriated funds for reorganization purposes without the prior approval of the Committees on Appropriations of the United States Senate and House of Representatives. The constitutional question decided by the court of appeals is related to the question of the constitutionality of the legislative veto provision in Section 244(c) of the Immigration and Nationality Act, 8 U.S.C. 1254(c), at issue in these consolidated cases.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

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THIRD SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

The Solicitor General, on behalf of appellant-respondent Immigration and Naturalization Service, submits this Supplemental Brief pursuant to Rule 35.5 of the Rules of this Court to bring to the Court's attention the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees* v. *Samuel R. Pierce, Secretary of Department of Housing and Urban Development*, No. 82-2372 (Dec. 8, 1982). In that case, the court of appeals held unconstitutional a provision in the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1164, that bars the use of appropriated funds, prior to January 1, 1983, to plan, design, implement, or administer any reorganization of the Department of Housing and Urban Development without the prior approval of the Committees on Appropriations of the United States Senate and House of Representatives.

In so ruling, the court of appeals relied on its previous decision in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209, which was adopted by the en banc court of appeals in *Consumers Union of the United States, Inc.* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982), appeal docketed, No. 82-935 (Dec. 6, 1982). The court reasoned that if the provision is viewed as giving either Appropriations Committee the authority to veto the use of appropriated funds for the specified purpose, it (i) violates the requirements in Article I, Section 7 of the Con-

stitution by permitting law to be made without a vote of both Houses of Congress and by circumventing the President's veto power, and (ii) violates the principle of separation of powers. Alternatively, the court reasoned that if the provision is viewed as granting to the two Appropriations Committees the power to lift a congressionally imposed restriction on the use of appropriated funds, the provision grants legislative power to congressional committees and is unconstitutional because it does not provide for the concurrence of the two Houses and presentation to the President. See slip op. 6-8. The court then concluded, after a review of the legislative history, that the veto provision is not severable from the remainder of the statutory restriction (*id.* at 8-11).

The constitutional questions decided by the court of appeals are closely related to those presented in the instant consolidated cases, and we therefore bring the court of appeals' decision to the attention of the Court. For the convenience of the Court, we have lodged 10 copies of the opinion with the Clerk of the Court.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 594024 1217

NO. 80-1832-AFX (Vide: 80-2170 80-2171)	TITLE Immigration and Naturalization Service, Appellant v. Jagdish Rai Chadha, et al.

DOCKETED	COURT
May 1, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Solicitor General
	Counsel for Appellees: Eugene Gressman
Mar. 10, 1981	Application for an extension of time to docket an appeal and order granting same until May 1, 1981 by Rehnquist, J., March 13, 1981.
May 1, 1981	Statement as to jurisdiction filed. (Record filed).
May 15, 1981	Order extending time to file a response to the petition until June 23, 1981.
May 20, 1981	Order further extending time to file a response to the petition until July 20, 1981.
June 22, 1981	Motion of appellee United States Senate to dismiss filed.
June 22, 1981	Motion of appellee United States House of Representatives to dismiss filed.
July 20, 1981	Memorandum of appellee Jagdish Rai Chadha filed. (Vide: 80-2170, 80-2171).
Sept. 2, 1981	DISTRIBUTED. SL25P1.
Sept. 4, 1981	Reply brief for the appellant filed. (D).
Oct. 1, 1981	Supplemental memorandum for the appellant filed.
Oct. 5, 1981	Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits in No. 80-1832. The petitions for writs of certiorari in Nos. 80-2170 and 80-2171 are GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.

Nov. 10, 1981	Motion of the Solicitor General for divided argument and for additional time for oral argument filed.
Nov. 9, 1981	Application for leave to file brief on the merits in excess of page limitations by Petitioner in 81-2170 and order granting same by Rehnquist, J., 11/10/81 - not to exceed 60 pages.
Nov. 19, 1981	Joint appendix filed. (Vide: 80-2170, 80-2171)
Nov. 19, 1981	Brief of the United States Senate, Appellee-Petitioner filed. (Vide: 80-2170, 80-2171).
Nov. 19, 1981	Brief of The U. S. House of Representatives filed. Appellee-Petioner, (Vide: 80-2170, 80-2171).

(Over)

80-1832

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 30, 1981	The motion of the Solicitor General for divided argument and for additional time for oral argument is GRANTED and an additional thirty minutes are allotted for oral argument.
Dec. 4, 1981	Application for leave to file the respondent's brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 12/9/81 - not to exceed 70 pages.
Dec. 16, 1981	Order extending time for the INS to file its brief on the merits until Jan. 8, 1982.
Dec. 22, 1981	Application of Jagdish Rai Chadha for leave to file the brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 12/23/81, not to exceed 65 pages.
Dec. 31, 1981	Brief for appellee-respondent Jagdish Rai Chadha filed. (Vide: 80-2170, 80-2171).
Jan. 7, 1982	Motion of Counsel on Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae filed. (Vide: 80-2170, 80-2171)
Jan. 7, 1982	Application for leave to file INS brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 1/8/82 - not to exceed 77 pages.
Jan. 8, 1982	Motion of Certain Members of the United States House of Representatives for leave to file a brief as amici curiae filed. (Vide: 81-2170, 8102171).
Jan. 8, 1982	Motion of American Bar Association for leave to file a brief as amicus curiae filed. (Vide: 81-2170, 81-2171).
Jan. 12, 1982	Brief for The Immigration and Naturalization Service filed. (Vide: 80-2170, 80-2171)
Jan. 18, 1982	The motion of Council of Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae is GRANTED. The motion of American Bar Association for leave to file a brief as amicus curiae is GRANTED. The motion of Philip Burton, et al. for leave to file a brief as amici curiae is GRANTED.
Jan. 19, 1982	CIRCULATED.
Feb. 2, 1982	Supplemental Brief for the INS service. (D) (Vide 80-2170, 80-2171)
Feb. 11, 1982	Reply brief for the United States Senate filed. (D) Vide: 80-2170, 80-2171.
Feb. 12, 1982	Reply brief for the United States House of Representatives filed. (Vide: 80-2170, 80-2171). (D).
Feb. 22, 1982	ARGUED.
July 2, 1982	The case is restored to the calendar for reargument. Brennan and Blackmun, JJ., dissent.

NO. 80-1832-AFX	TITLE Immigration and Naturalization Serivce, Appellant v. Jagdish Rai Chadha, et al.

DOCKETED	COURT
May 1, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 19, 1982	Motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument. (Also in 80-2170, 80-2171).
Nov. 22, 1982	Motion of petitioner in No. 80-2171 for leave to file a supplemental bref on reargument filed. (Vide: 80-2170, 80-2171).
Nov. 18, 1982	Supplemental breif for the Immigration and Naturalization Service filed. (Vide: 80-2170, 80-2171).
Nov. 22, 1982	DISTRIBUTED. 11-24. (Above two motions).
Nov. 29, 1982	The motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument is GRANTED. The motion of petitioner in No. 80-2171 for leave to file a supplemental brief on reargument is GRANTED.
Dec. 3, 1982	Brief for appellant-respondent Immigration and Naturalizati Service in response to the Supplemental Briefs on Reargument for the U. S. Senate and House of Representatives filed. (Vide: 80-2171, 80-2171). (D).
Dec. 7, 1982	ARGUED.
Dec. 21, 1982	Supplemental brief for the Immigration and Naturalization Service filed. (Vide: 80-2170, 80-2171).

NO. 80-2170-CFX	TITLE United States House of Representatives, Petitioner v.
VIDE: 80-1832 80-2171	Immigration and Naturalization Service, et al.

DOCKETED	COURT
June 22, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Eugene Gressman
	Counsel for Respondents: Solicitor General, Alan B. Morrison,
June 22, 1981	Petition for writ of certiorari filed. (Record filed).
July 20, 1981	Memorandum of respondent Jagdish Rai Chadha filed. (Vide: 80-1832, 80-2171).
July 27, 1981	Order extending time for respondent INS to file a response to the petition until Aug. 24, 1981.
Aug. 28, 1981	Memorandum for the Federal Respondent filed. (Vide: 80-2171) (Filed by the Solicitor General).
Sept. 2, 1981	DISTRIBUTED. SL25P1.
Oct. 5, 1981	Further consideration of the question of jurisdiciton is postponed to the hearing of the case on the merits in No. 80-1832. The petitions for writs of certiorari in Nos. 80-2170 and 80-2171 are GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.

Nov. 10, 1981	Motion of the Solicitor General for divided argument and for additional time for oral argument filed.
Nov. 9, 1981	Application for leave to file brief on the merits in excess of page limitations by Petitioner in 81-2170, and order granting same by Rehnquist, J., 11/10/81 - not to exceed 60 pages.
Nov. 19, 1981	Joint appendix filed. (Vide: 80-1832, 80-2171)
Nov. 19, 1981	Brief of The United States Senate, Appellee-Petitioner filed. (Vide: 80-1832, 80-2171).
Nov. 19, 1981	Brief of the U. S. House of Representatives, Appellee-Petitioner filed. (Vide: 80-1832, 80-2171).
Nov. 30, 1981	The motion of the Solicitor General for divided argument and for additional time for oral argument is GRANED and an additional thirty minutes are allotted for oral argument.
Dec. 4, 1981	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 12/9/81 - not to exceed 70 pages.

(Over)

80-2170

Title

No.

DATE	PROCEEDINGS AND ORDERS
Dec. 16, 1981	Order extending time for the INS to file its brief on the merits until Jan. 8, 1982.
Dec. 22, 1981	Application of Jadgish Rai Chadha for leave to file the brief on the merits in excess of page limitations, and order granting same by Rehnquist, j., 12/23/81, not to exceed 65 pages.
Dec. 31, 1981	Brief for appellee-respondent Jagdish Rai Chadha filed. (Vide: 80-1832, 81-2171)
Jan. 7, 1982	Motion of Counsel on Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae filed. (Vide: 80-1832, 80-2171)
Jan. 7, 1982	Application for leave to file INS brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 1/8/82 - not to exceed 77 pages.
Jan. 8, 1982	Motion of Certain Members of the United States House of Representatives for leave to file a brief as amici curiae filed. (Vide: 80-1832, 80-2171).
Jan. 8, 1982	Motion of American Bar Association for leave to file a brief as amicus curiae filed. (Vide: 80-1832, 80-2171).
Jan. 18, 1982	The motion fo Council on Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae is GRANTED. The motion of American Bar Association for leaf to file a brief as amicus curiae is GRANTED. The motion of Philip Burton, et al. for leave to file a brief as amici curiae is GRANTED.
Jan. 12, 1982	Brief for The Immigration and Naturalization Service filed. (Vide: 80-1832, 80-2171).
Jan. 19, 1982	CIRCULATED.
FEb. 2, 1982	Supplemental brief for the INS filed. (D). (Vide: 80-1832, 80-2171).
Feb. 11, 1982	Reply brief of the U. S. Senate filed. (D). (Vide: 80-1832, 80-2171).
Feb. 12, 1982	Reply brief for the United States House of Representatives filed. (D). (Vide: 80-1832, 80-2171).
Feb. 22, 1982	ARGUED.
July 2, 1982	The case is restored to the calendar for reargument. Brennan and Blackmun, JJ., dissent.
Nov. 19, 1982	Motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument filed. (Also in 80-1832, 80-2171).
Nov. 22, 1982	Motion of petitioner in No. 80-2171 for leave to file a supplemental brief on reargument filed. (Vide: 80-1832, 80-2171).
Nov. 18, 1982	Supplemental brief for the Immigration and Naturalization Service filed. (Vide: 80-1832, 80-2171).

(Card No. 2).

NO. 80-2170-CFX	TITLE United States House of Representatives, Petition v. Immigration and Naturalization Service, et al.

DOCKETED	COURT
June 22, 1982	Unite States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 22, 1982	DISTRIBUTED. 11-24. (Motions of petitioners for leave to file supplemental brief on reargument).
Nov. 29, 1982	The motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument is GRANTED. The motion of petitioner in No. 80-2171 for leave to file a supplemental brief on reargument is GRANTED.
Dec. 3, 1982	Brief for appellant-respondent Immigration and Naturalization Service in response to the Supplemental Brief on Reargument for the U. S. Senate and House of Representatives filed. (Vide: 80-1832, 80-2171) (D).
Dec. 7, 1982	ARGUED.
Dec. 21, 1982	Supplemental brief for the Immigration and Naturalization Service filed. (Vide: 80-1832, 80-2171).

NO. 80-2171-CFX VIDE: 80-1832 80-2170	TITLE United States Senate, Petitioner v. Immigration and Naturalization Service, et al.

DOCKETED	COURT
June 22, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Michael Davidson
	Counsel for Respondents: Solicitor General, Alan B. Morrison,
June 22, 1981	Petition for writ of certiorari filed. (Record filed).
July 20, 1981	Memorandum of respondent Jagdish Rai Chadha filed. (Vide: 80-1832, 80-2170).
July 27, 1981	Order extending time for respondent INS to file a response to the petition until Aug. 24, 1981.
Aug. 28, 1981	Memorandum for the Federal Respondent filed. (Vide: 80-2170). (Filed by the Solicitor General).
Sept. 2, 1981	DISTRIBUTED. SL25P1.
Oct. 5, 1981	Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits in No. 80-1832. The petitions for writs of certiorari in Nos. 80-2170 and 80-2171 are GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.

Nov. 10, 1981	Motion of the Solicitor General for divided argument and for additional time for oral argument filed.
Nov. 9, 1981	Application for leave to file brief on the merits in excess of page limitations by Petitioner in 81-2170, and order granting same by Rehnquist, J., 11/10/81 - not to exceed 60 pages.
Nov. 19, 1981	Joint appendix filed. (Vide: 80-1832, 80-2170)
Nov. 19, 1981	Brief for the United States Senate, Appellee-Petitioner filed. (Vide: 80-1832, 802170).
Nov. 19, 1981	Brief of The U. S. House of Representatives, Appellee-Petitioner filed. (Vide: 80-1832, 80-2170).
Nov. 30, 1981	The motion of the Solicitor General for divided argument and for additional time for oral argument is GRANTED and an additional thirty minutes are allotted for oral argument.
Dec. 4, 1981	Application for leave to file respondent's brief on the merits in excess of page limitations and order granting same by Rehnquist, J., 12/9/81 - not to exceed 70 pages.
	(Over)

80-2171

Title

No.

DATE	PROCEEDINGS AND ORDERS
Dec. 16, 1981	Order extending time for the INS to file its brief on the merits until Jan. 8, 1982.
Dec. 22, 1981	Application of Jagdish Rai Chadha for leave to file the brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 12/23/81, not to exceed 65 pages.
Dec. 31, 1981	Brief of appellee-respondent Jagdish Rai Chadha filed. (Vide: 80-1832, 80-2170).
Jan. 7, 1982	Motion of Counsel on Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae filed. (VideL 80-1832, 80-2170)
Jan. 7, 1982	Application for leave to file INS brief on the merits in excess of page limitations, and order granting same by Rehnquist, J., 1/8/82 - not to exceed 77 pages.
Jan. 8, 1982	Motion of Certain Members of the United States House of Representatives for leave to file a brief as amici curiae filed. (Vide: 80-1832, 80-2170).
Jan. 8, 1982	Motion of American Bar Association for leave to file a brief as amicus curiae filed. (Vide: 80-1832, 80-2171).
Jan. 18, 1982	The motion of Council on Administrative Law of the Federal Bar Association for leave to file a brief as amicus curiae is GRANTED. The motion of American Bar Association for leave to file a brief as amicus curiae is GRANTED. The motion of Philip Burton, et al. for leave to file a brief as amici curiae is GRANTED.
Jan. 12, 1982	Brief for The Immigration and Naturalization Service filed. (Vide: 80-1832, 80-2170).
Jan. 19, 1982	CIRCULATED.
Feb. 2, 1982	Supplemental brief for the INS filed, (D). (Vide: 80-1832, 80-2170)
Feb. 11, 1982	Reply brief for the U. S. Senate filed. (D). (Vide: 80-1832, 80-2170).
Feb. 12, 1982	Reply brief for the United States House of Representatives filed. (D). (Vide: 80-1832, 80-2170).
Feb. 22, 1982	ARGUED.
July 2, 1982	The case is restored to the calendar for reargument. Brennan and Blackmun, JJ., dissent.
Nov. 19, 1982	Motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument filed. (Also in 80-1832, 80-2170).
Nov. 22, 1982	Motion of petitioner in No. 80-2171 for leave to file a supplemental brief on reargument filed. (Vide: 80-1832, 80-2170).
Nov. 18, 1982	Supplemental brief for the Immigration and Naturalization Service filed. (80-1832, 80-2170).
Nov. 22, 1982	DISTRIBUTED. 11-24. (Above to motions).

(Card No. 2)

NO. 80-2171-CFX	TITLE United States Senate, Petitioner v. Immigration and Naturalization Service, et al.

DOCKETED	COURT
June 22, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 29, 1982	The motion of petitioner in No. 80-2170 for leave to file a supplemental brief on reargument is GRANTED. The motion of petitioner in No. 80-2171 for leave to file a supplemental brief on reargument is GRANTED.
Dec. 3, 1982	Brief for appellant-respondent Immigration and Naturalization Service in response to the Supplemental Briefs on Reargument for the U. S. Senate and House of Representatives filed. (Vide: 80-1832, 8102170) (D).
Dec. 7, 1982	ARGUED.
Dec. 21, 1982	Supplemental brief for the Immigration and Naturalization Service filed. (Vide: 80-1832, 80-2170).